Supreme Court, U.S.
FILED
07-926 JAN 9 - 2008
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

AUGUSTA N. ROMAN, PETITIONER

VS.

RANDY M. ROMAN, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

TERESA STANTON COLLETT
University of St. Thomas
School of Law*
MSL 400, 1000 La Salle Avenue
Minneapolis, MN 55403-2015
(651) 962-4973
tscollett@stthomas.edu

*affiliation shown for informational purposes only

Questions Presented

1. Whether the fundamental right to procreate is violated by a judicial order denying implantation of embryos by a genetic parent who is unable to conceive or bear a biological child by other means.

2. Whether the constitutional liberty interest in decisions whether to bear or beget a child encompasses a right to deny implantation of embryos in a genetic parent who desires the implantation.

3. Whether the fundamental right to enter into familial relationships is violated by a judicial order denying implantation of embryos by a genetic parent who is unable to conceive or bear a biological child by other means.

Parties to the Proceeding

Petitioner is Augusta N. Roman. Respondents are Randy M. Roman, and Vicki Schnell, M.D., The Center for Reproductive Medicine.

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OPINIONS BELOW

The Findings of Fact and Conclusions of Law entered by the District Court for the 310 Judicial District, Harris County, Texas are unreported. A copy is attached at Pet. App. 36-43. The opinion of the Texas Court of Appeals (Pet. App. 1-35) is reported at *Roman v. Roman*, 193 S.W.3d 40 (Tex. Civ. App. 2006). The order of the Texas Supreme Court denying review was entered on August 24, 2007 and is attached as Pet. App. 44. Petitioner's Motion for Rehearing from Denial of Petition for Review was denied by order of the Texas Supreme Court on October 12, 2007 and is attached as Pet. App. 43.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 2006. Petitioner filed a Motion for Rehearing and Motion for Rehearing *en Banc;* on May 18, 2006, both Motions for Rehearing were denied. On August 24, 2007, the Texas Supreme Court denied Petitioner's Motion for Review. Petitioner's Motion for Rehearing from Denial of Petition for Review was denied by order of the Texas Supreme Court on October 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST. amend. I.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

The issues requiring review by this Court arise in the divorce proceeding of Petitioner, Augusta N. Roman ("Augusta") and her former husband Randy M. Roman ("Randy"). The only matter in dispute was and is the fate of the frozen embryos created by the joining of Augusta's eggs with Randy's sperm through an *in vitro* fertilization process ("IVF").

Augusta and Randy were married on July 5, 1997. Augusta experienced a miscarriage in 1999. In 2000, unable to conceive naturally, they began an extended course of medical treatment, hoping to successfully conceive and bear a child. Augusta had five artificial inseminations, invasive diagnostic tests, and laparoscopic surgery, but was still unsuccessful at getting pregnant. Upon the recommendation of their doctor, the parties then began the IVF process.

In compliance with the requirements of their medical provider, the Center for Reproductive Medicine ("Center"), the parties signed a number of documents, including one entitled "Informed Consent for Cryopreservation of Embryos" ("contract" or "agreement"). In this contract, Augusta and Randy agreed to the IVF process, which included implantation of fresh fertilized developing embryos into Augusta's womb. The couple also authorized freezing of any remaining embryos until they agreed to future implants and the Center determined that appropriate conditions existed for

transfer of the embryos to Augusta's uterus. In addition, the parties elected to discard any remaining, stored, frozen embryos in the event of divorce. It was Augusta's understanding that the cryopreservation form she signed referred only to frozen embryos remaining after the implantation procedure; Augusta did not sign the document with any intent to destroy all of the embryos, having never attempted implantation.

On April 17, 2002, thirteen eggs were extracted from Augusta while she was under general anesthesia; the eggs were fertilized with Randy's sperm, resulting in six developing embryos. Implantation of the embryos was scheduled for April 20th. Late on the evening of April 19, 2002, Randy informed Augusta that he was unwilling to go forward with the implantation scheduled for the next day. No implantation attempt ever occurred due to Randy's objection.

Only three of the embryos ultimately were selected for cryogenic preservation via freezing. These embryos are the subject of this petition.

On December 10, 2002, Randy filed for divorce and Augusta filed a counterclaim. The parties reached a final binding agreement during mediation as to all matters, except for control of the frozen embryos.

Evidence at trial established that Randy is fertile and able to participate in the conception of other biological children. In contrast, Augusta's physician testified that Augusta is medically infertile.[1]

On May 13, 2004, Findings of Fact and Conclusions of Law were entered by the District Court for the 310 Judicial District, Harris County, Texas, finding that the embryos were community property and ordering that Augusta take possession of the embryos as part of a just and right division of the community estate. In addressing the constitutional claims presented by the parties, the court found, "[t]he court considered all evidence and testimony in balancing the constitutional rights of both parties in making the award of the three (3) frozen embryos to AUGUSTA N. ROMAN." *Roman v. Roman*, No. 2002-63153, Findings of Facts and Conclusions of Law (Dist. Ct., 310 Judicial Dist., Harris Cty., Tex.), pet. app. 39.

Randy appealed to the Court of Appeals for the First District of Texas, arguing in part that the

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[1] At the time of the trial, Augusta was forty-two years old. She is now forty-six. "Success rates [of assisted reproductive technologies] decline with each year of age and are particularly low for women 40 or older. . . . For women older than 44, the live birth rates and singleton live birth rates were both a little less than 1%." Ctrs. for Disease Control and Prevention, U.S. Dep't of Health & Human Servs., 2004 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 25 (2006).

order of the trial court violated his constitutional right to not procreate. *Roman v. Roman*, 193 S.W.3d 40, 42 (Tex. Civ. App. 2006). In her response Augusta asserted that her right to bear and beget a child was superior to any constitutional right that Randy might have to avoid procreation after he had voluntarily participated in IVF. Brief of Appellee at 21-28, *Roman v. Roman*, 193 S.W.3d 40, 42 (Tex. Civ. App. 2006) (No. 01-04-541 CV).

The Court of Appeals declined to reach the constitutional issues, holding that the contract between the Center and the Romans was valid and enforceable, and that an order from the trial court should issue directing that the frozen embryos be discarded in accordance with the agreement. *Roman*, 193 S.W.3d at 55.

Augusta filed a Motion for Rehearing and Motion for Rehearing *en Banc*. On May 18, 2006, both Motions for Rehearing were denied.

Augusta then filed a petition for review with the Texas Supreme Court asserting denial of her constitutional rights. Augusta Roman's Petition for Review at 13, *Roman v. Roman*, No. 06-0554 (Tex., filed Aug. 1, 2006). Her petition was denied without opinion on August 24, 2007. Her *Motion for Rehearing from Denial of the Petition for Review* was denied on October 12, 2007.

Augusta now appeals to this Court on the basis that the order of the Texas Court of Appeals for the First District violates her right to bear and beget

a child and to enter into familial relations. She wants the child, or children, which might result from implanting the three remaining embryos.[2] She neither seeks nor expects Randy to assume any parental or financial obligations for children born from the embryos.[3]

REASONS FOR GRANTING CERTIORARI

I. REVIEW BY THIS COURT IS NECESSARY TO ANSWER THE IMPORTANT QUESTION OF WHETHER THE FUNDAMENTAL RIGHT TO PROCREATE IS VIOLATED BY DENYING IMPLANTATION OF EMBRYOS IN A GENETIC PARENT WHO IS UNABLE TO CONCEIVE OR BEAR A BIOLOGICAL CHILD BY OTHER MEANS.

This case presents important questions that have emerged in the past thirty years regarding the application of constitutional protections to the creation of human life by assisted reproductive technologies ("ART").

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[2] If this Court is unwilling to direct the distribution of the embryos to Augusta for implantation, she seeks an order directing the embryos be made available for adoption by others so that she may be comforted by the knowledge that her biological children have been given every opportunity to develop and flourish.

[3] This outcome is consistent with Texas law which provides, "if a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child." TEX. FAM. CODE § 160.706(a).

For over eighty years this Court has addressed the right of citizens to decide whether and when to bear a child. Early cases dealt with issues arising from state interference with the ability of individuals to become genetic parents In 1927 the Court upheld a Virginia statute allowing sterilization of "mental defectives" in *Buck v. Bell*, 274 U.S. 200 (1927). Fifteen years later, when confronted with questions surrounding the use of sterilization as a criminal sanction, the Court characterized the right to bear children as "one of the basic civil rights of man" and struck down the Oklahoma statute at issue. *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942).

Twenty years later, the second strand of this Court's jurisprudence regarding procreation emerged. Cases involving state regulation of the sale and use of contraception presented issues of intentional parenthood. *See e.g. Griswold v. Connecticut*, 381 U.S. 479 (1965) (established the right of married couples to use contraception). Characterizing the issue at stake in these cases, Justice Brennan wrote, "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right to use contraception to unmarried adults).

In 1973 the Court began developing the most recent thread of its procreation jurisprudence. In *Roe v. Wade*, 410 U.S. 113 (1973) the Court declared

that the Constitution prohibited laws banning abortion. Cast initially as a matter of private medical decision making by a woman and her physician, *id.* at 156, more recent cases have grounded the woman's right to abort her pregnancy, in part, in her right to bodily integrity. *See Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 71 (1976) ("[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor") and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality) ("[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."). *Cf. Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (state hospital's urine tests of pregnant patients to obtain evidence of cocaine use were unreasonable searches absent patients' consent, even if ultimate goal was to get pregnant women off drugs and into treatment).

Each of these themes – the rights of those who would be genetic parents, the rights of those who seek to avoid pregnancy, and the rights of women experiencing pregnancy – come out of cases involving sexual intercourse and resulting pregnancies. All of the cases presume a unity of genetic, intended, and gestational parenting. None deal with the fragmentation of parenting that can occur with the use of ART.

This Court's silence on the application of constitutional principles to ART is due to the

development of these principles prior to the emergence of ART as a recognized medical procedure. *But see Webster v. Reproductive Health Services*, 522 U.S. 490, 492 (1989) (O'Connor, J., concurring) (rejecting claims that preamble of Missouri statute would impact the practice of *in vitro* fertilization). It was only after the birth of Louise Brown, the first "test-tube" baby, that legal regulation of ART became a part of the public dialogue regarding the creation of human life. *Cf.* The President's Council on Bioethics, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF THE NEW BIOTECHNOLOGIES (2004) at 3 ("We are well aware that assisted reproduction is not new – indeed, over the past quarter-century it has become firmly established within the practice of medicine, and it is thus subject to the usual formal and informal mechanisms that regulate medical practice.")

Through the use of ART, it is now possible for a child to be born, subject to claims of parentage by six individuals. This can occur in cases in which two individuals enter into a contract with a sperm and egg donor for the creation of human embryos that are implanted in a fifth unrelated woman, who is married at the time the embryos are implanted and brought to term in her body. The original individuals are the intended parents. *Compare Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 4 Dist. 1998) (intended parents who contracted with a surrogate were the legal parents of the child, even though they had no genetic relationship to the child) with *Robert B. v. Susan B.*, 135 Cal. Rptr.2d 785 (Ct. App. 6 Dist. 2003) (intended mother, who had no

genetic relationship with child, had no standing to challenge listing of gestational mother on child's birth certificate, notwithstanding that gestational mother had given birth to child as result of fertility clinic placing wrong embryo in her uterus). The egg and sperm donors are the genetic parents. *See e.g. Arredondo by Arredondo v. Nodelman*, 622 N.Y.S.2d 181 (Sup. Ct. 1994). The woman carrying the child to term is the gestational mother. *See e.g. In re Roberto d. B.*, 923 A.2d 115 (Md. 2007) (Maryland law permits birth certificate listing only father in case where sperm of unmarried intended father is combined with donor egg to create embryo which is brought to term by gestational mother); other cases collected in Ardis L. Campbell, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R. 5th 567 (2000). If married, the husband of the gestational mother may be legally presumed to be the father of the child if the child is born during the marriage. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding constitutionality of statutory presumption that issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage).

The present case presents a far simpler scenario. Randy originally was the intended and genetic father of any children resulting from his and Augusta's participation in IVF. Augusta is the intended and genetic mother of any children resulting from the same process. She wants to complete the IVF process by becoming the gestational mother, implanting the embryos and

bringing them to term in her body. Randy has changed his mind since initiating the IVF process, and no longer desires to father children through the implantation and gestation of the embryos he and Augusta created.

The relative simplicity of the facts in this case belies the complexity of the constitutional questions presented. As the President's Council on Bioethics observed in its 2002 report, REPRODUCTION AND RESPONSIBILITY:

> [T]he Constitution recognizes certain individual rights inhering in all citizens (or, depending on the right, in all persons), as well as liberties that may be vindicated against both state and federal governments. The assertion of such rights can be controversial, especially in cases in which the rights in question are not explicitly enumerated in the Constitution itself. One such controversial right is, of course, the right to privacy in intimate matters relating to procreation. The relevance of the right to privacy to the regulation of assisted reproduction is easily recognized, while its likely application in actual cases is difficult to predict.

The President's Council on Bioethics, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF THE NEW BIOTECHNOLOGIES (2004) at 9.

Appellate courts in seven states have addressed competing claims of intended parents over the implantation or destruction of frozen embryos. *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E. 2d 1051 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006); and *Litowitz v. Litowitz*, 48 P.3d 261, 262 (Wash. 2002). In four cases, the intended parents were the genetic parents of the embryos as well. *Witten*, 672 N.W.2d at 772; *A.Z.*, 725 N.E. 2d at, 1052-53; *Kass*, 696 N.E.2d at 175-76; *Davis*, 842 S.W.2d at 592 (Tenn. 1992); and *Roman*, 193 S.W.3d at 42. In four cases the intended mother sought custody of the embryos in order to act as the gestational mother by having the embryos implanted in herself. *Witten*, 672 N.W.2d at 772; *A.Z.*, 725 N.E. 2d at 1055; *Kass*, 696 N.E.2d at 177 (same); and *Roman*, 193 S.W.3d at 43 (same). In the fifth case of *Litowitz v. Litowitz*, 48 P.3d 261, 262 (Wash. 2002), Mrs. Litowitz was unable to bring the embryos to term within her womb, and sought to have the embryos brought to term through gestation by a relative.

In the course of their analyses, several courts noted that whether a genetic parent has the ability to have other children is central to the proper resolution of the constitutional issues in the case. "The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other

reasonable means." *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992). "M.B.'s right to procreate is not lost if he is denied an opportunity to use or donate the preembryos. M.B. is already a father and is able to become a father to additional children, whether through natural procreation or further *in vitro* fertilization." *J.B. v. M.B.*, 783 A.2d 707, 717 (N.J. 2001). *See also Litowitz v. Litowitz*, 48 P.3d 261, 262 (Wash. 2002) (husband and wife had children when they underwent IVF). *But see Kass v. Kass*, 663 N.Y.S.2d 581, 584-85 (App. Div. 1997) (disregarding history of wife's failure to become pregnant and ordering embryos be donated for research).

Augusta has no other children. The ruling of the Texas appellate court denying Augusta control of the embryos has effectively rendered her barren. Implantation of these embryos is her only opportunity to bear biologically-related children. As this Court noted in a different context:

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. *He is forever deprived of a basic liberty.*

Skinner v. State of Okl. ex rel. Williamson, 316 U.S. 535, 541 (1942).

In the present case, this deprivation is the direct result of a Texas court's order. "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). *See also Barrows v. Jackson*, 346 U.S. 249, 252 (1953). The extent and nature of Augusta and Randy's relationship to the embryos was presented to the Texas courts for resolution as part of the Romans' divorce proceedings. The very purpose of a divorce action is to alter the parties' legal relationship with each other, with others (*e.g.* children, creditors, etc.), and with the state, as well as to determine the proper ownership of property created or acquired during the marriage. As such, the granting of a divorce, with its attendant orders dissolving the marriage and resolving issues of child custody and property division, is a prime example of state action. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (state's monopoly over dissolution of marriage constitutes state action). The state of Texas, through the decision of its Court of Appeals, has, in the words of this Court, forever deprived Augusta of a basic liberty – to bear the child she created with her former husband.

Given the simplicity of the facts in the present case, it is an ideal vehicle for this Court to address the application of the right to bear or beget a child in cases involving assisted reproductive technology.

II. REVIEW BY THIS COURT IS NECESSARY TO SETTLE THE IMPORTANT QUESTION OF WHETHER THE CONSTITUTIONAL LIBERTY INTEREST IN AVOIDING PROCREATION INCLUDES A RIGHT TO DENY IMPLANTATION OF EMBRYOS IN AN INTENDED PARENT.

Tennessee courts were first to confront the question of whether embryos can be destroyed over the expressed desire of a genetic parent to have them implanted. In examining the parties' constitutional claims, the Tennessee Supreme Court declared, "whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance - the right to procreate and the right to avoid procreation." *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992). Relying primarily on abortion cases, the court opined, "an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood." *Id.*

Yet nothing in this Court's abortion jurisprudence suggests that the right of a woman to terminate her pregnancy includes the right of any individual to veto attempts by another to become pregnant. In fact, the implication from this Court's cases is directly contrary. In *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976) this Court opined, "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the

reason for withholding the consent." *Id.* at 75. *See also Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 887 (1992) (rejecting statutory requirement of notification to husband that wife intended to obtain abortion).

It would be an odd type of liberty that prohibits a third-party veto over the decision to terminate a pregnancy while permitting such a veto over the decision to become pregnant.

Contrary to the holding of the *Davis* court, 842 S.W.2d 601, the constitutional prohibition of interference in the decision to bear or beget a child is found in cases discussing access to contraception, not abortion. In *Griswold v. Connecticut*, 381 U.S. 479 (1963) (plurality) the Court found that married couples had a constitutional right to use contraceptives based on the nature of marriage and the penumbras emanating from various amendments to the Constitution. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972) the right of access to contraception was extended to unmarried adults under the equal protection clause of the Fourteenth Amendment. Nothing in either case supports expanding adults' constitutional right to access contraception to include a right to deny implantation of the embryos by an intended parent.

Recognition of Randy's purported right to forbid Augusta's implantation of the embryos would ratify third party vetoes over any decision to create or continue a pregnancy. It would support the enforcement of provisions in pre- or post-nuptial

agreements requiring a woman refrain from getting pregnant. *Cf. Height v. Height*, 187 N.Y.S.2d 260, 262 (Sup. Ct. 1959) (a prenuptial "agreement [is] void which contemplates forbearance from having children, since it is a matter of public policy that marriage exists primarily for begetting offspring, and the right to normal and proper sex relations is implicit in the marriage contract"). *See also* Joline Sikaitis, *A New Form of Family Planning? The Enforceability of No-Child Provisions in Prenuptial Agreements*, 54 Cath. U. L. Rev. 335 (2004); and Jill Brooke, *A Promise to Love, Honor and Bear No Children*, N.Y. TIMES, Oct. 13, 2002, § 9, at 1 (noting increasing use of "no-child" provisions in prenuptial agreements). Recognition of such a right would support enforcement of contractual provisions requiring men and women to delay or avoid childbearing in other contexts as well. *Cf. Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (corporate policy barring fertile women from certain positions violated federal anti-discrimination law). Ultimately, such a right could be interpreted to require judicial enforcement of provisions in surrogacy agreements empowering intended parents to direct a gestational mother to obtain an abortion. *Cf. Matter of Baby M.*, 525 A.2d 1128, 1159 (N.J. Super. 1987) *rev'd in part, aff'd in part* 537 A.2d 1227 (N.J. 1988) (declaring such a provision unenforceable). In short, it would require courts enforce the transfer of decision-making power over whether to bear or beget a child from the person seeking to become a parent to individuals seeking to deny that outcome.

Constitutionalizing a right to direct the destruction of embryos in the face of a genetic parent's desire to implant the embryos is also problematic because such a decision would foreclose any accommodation of the conflicting rights between a father who seeks to continue gestation of a fetus in an artificial womb and a mother's right to be free of the physical burdens of pregnancy. "To say that recognizing a right of reproductive freedom is tantamount to conferring an affirmative right to kill a fetus is to forget, among other things, that embryos can now be frozen; it would be quite a leap beyond *Roe* and *Casey* to posit that such an embryo's genetic mother has a right to ensure its destruction." Lawrence Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1930 (2004). *Cf. Roe v. Wade*, 410 U.S. 113, 161 (1973) (acknowledging that the development of an artificial womb would be relevant to constitutional interpretation).

It is important that this Court review this case in order to dispose of the claim that the constitutional liberty interest in decisions whether to bear or beget a child encompasses a right to deny implantation of embryos in the intended mother.

III. REVIEW BY THIS COURT IS NECESSARY TO SETTLE THE IMPORTANT QUESTION OF WHETHER THE FUNDAMENTAL RIGHT TO ENTER INTO AND ENJOY FAMILIAL RELATIONSHIPS IS VIOLATED BY A JUDICIAL ORDER DENYING IMPLANTATION OF EMBRYOS BY A GENETIC PARENT WHO IS UNABLE TO CONCEIVE OR BEAR A BIOLOGICAL CHILD BY OTHER MEANS.

In the present case Augusta seeks to continue the familial relationship with her biological offspring that began when her eggs and Randy's sperm were combined to create the embryos at issue in this case.

> [T]he usual understanding of "family" implies biological relationships, and most decisions treating the relation between parent and child have stressed this element. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), for example, spoke of "(t)he rights to conceive and to raise one's children" as essential rights, citing *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 843 (1977). The existence of a familial relationship from the moment of conception is well recognized in American law. "[S]ome States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal

injuries. . . . Similarly unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem." *Roe v. Wade*, 410 U.S. 113, 162 (1973).

Randy claims a right to terminate Augusta's familial relationship with the embryos because, notwithstanding his voluntary and intentional participation in their creation, he no longer wishes to allow them to develop. Nowhere in American law are men given the power to destroy the familial relationships of others. In fact, American law routinely holds men responsible for children they father, regardless of their intent. *See Beard v. Skipper*, 451 N.W.2d 614 (Mich. App. 1990) (rejecting argument that a man who did not intend the creation of a child should be excused from legal responsibilities as father); *State v. Frisard*, 694 So. 2d 1032 (La. App. 5th Cir. 1997) (procurement of sperm via oral sex irrelevant to determination of paternity); *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186 (Ala. Civ. App. 1996) (fact that man was unconscious during sexual act irrelevant to determination of paternity); and *San Luis Obispo Co. v. Nathaniel J.*, 50 Cal. App. 4th 842 (Ct. App. 2d Dist. 1996) (fact that father was victim of sexual assault irrelevant to determination of paternity). *But see Ferguson v. McKiernan*, No. 16 MAP 2005, 2007 WL 4555436 (Pa. Dec. 27, 2007) (oral agreement that sperm donor would not be liable for child support found enforceable). Additional cases collected in Anne M. Payne, *Sexual Partner's Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding*

Sterility or Use of Birth Control Resulting in Pregnancy, 2 A.L.R.5th 301 (1992).

The Texas court rejected Augusta's claim to continue her relationship with the embryos in the face of Randy's claim that he would be psychologically burdened by the knowledge that he had fathered children. Courts rejecting claims of a right to post-divorce implantation of embryos have identified two reasons for their rejection: 1) permitting implantation forces the legal and financial burden of parentage upon the objecting ex-spouse; and 2) permitting implantation imposes a form of "psychological bondage" upon the objecting ex-spouse. *E.g. Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993); *J.B. v. M.B.*, 783 A.2d 707, 717 (N.J. 2001); and *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000). Augusta does not seek to impose any financial and legal burden on Randy, and such an outcome is consistent with the Texas statute on post-divorce implantation. *See* Tex. Fam. Code § 160.706(a).

The rationale that psychological burdens attach merely from the man's contribution of sperm is unsupported by research on parent-child bonding. Children born to non-resident fathers have substantially less contact with their fathers. This lack of contact increases dramatically with the deterioration of the relationship between the mother and father. "[M]others who report that they are 'friends' with the father are four times more likely to report that the father has seen the child in the previous month than mothers who report 'no

relationship,' 74 percent versus 17 percent (not shown)." The Bendheim-Thoman Center for Research on Child Wellbeing, *Parents Relationship Status Five Years after a Non-marital Birth* at 2 (June, 2007) at http://www.fragilefamilies.princeton.edu/briefs/ResearchBrief39.pdf. Independent of the quality of the relationship between the parents, by the time a non-marital child is five, 37% of the non-resident fathers will have not seen the child in the past two years. Marcia J. Carlson *et al.*, *Co-parenting and Non-Resident Fathers' Involvement with Young Children after a Non-marital Birth* at 34 (May 2007) at http://crcw.princeton.edu/workingpapers/WP05-07-FF.pdf. And this percentage increases as the child grows older, given that the biggest drop-off in involvement for (mostly divorced) nonresident fathers occurs five years after the couple's romantic relationship ends. *Id.* at 35. Given the unique circumstances which would surround any pregnancy Augusta would experience from implantation, it seems probable that Randy's involvement with any child would be minimal.

Psychological bonding between parent and child, particularly if that parent is the father, is far more complex than mere biological attachment. Cf, *Rainey v. Chever*, 527 U.S. 1044 (1999) (mem.) (arguing for review of a Georgia statute regarding inheritance by parents of deceased children born out of wedlock). Among the relevant factors, in order of importance are cohabitation and proximity, the relationship with the other parent, romantic relationships with persons other than the other parent, and the type of family in which the parent

grew up. Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 Am. U. L. Rev. 1021, 1062 (2004). All of these studies have led one legal commentator to assert that the threat of "psychological bondage is a product of the courts' collective imagination." *Id.*

It is beyond dispute that Augusta's primary purpose in undergoing IVF was to give birth to a child she was biologically related to. Because Augusta desires the pregnancy that may result from implantation of these embryos, the issues in this case do not raise the specter of forced pregnancies in which a woman is compelled to carry a child within her body. *Cf. Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 852 (1992) (plurality op.) ("mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear"). By ordering that the embryos be discarded the Texas court has allowed Randy to dictate the extent and duration of Augusta's familial relationship with any children that may result from the couple's voluntary participation in IVF.

This Court should accept review of this case in order to define the constitutional limits of judicial orders terminating familial relationships arising from the use of assisted reproduction technology.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TERESA STANTON COLLETT
University of St. Thomas
School of Law*
MSL 400, 1000 La Salle Avenue
Minneapolis, MN 55403-2015
(651) 962-4973
tscollett@stthomas.edu

JANUARY 2008

*affiliation shown for informational purposes only

In The Court of Appeals
For The First District of Texas

NO. 01-04-00541-CV

RANDY M. ROMAN, Appellant

V.

AUGUSTA N. ROMAN, Appellee

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 2002-62153

OPINION

Issue February 9, 2006

In a case of first impression in Texas, appellant, Randy M. Roman, appeals the judgment of the trial court that awarded three frozen embryos[1]

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[1] Although "preembryo" is a medically accurate term for a zygote, or fertilized egg, that has not been implanted in a uterus, we will use the term embryo for linguistic convenience. *See* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 952 n.45 (1986). Frozen embryos is "the term

to appellee, Augusta N. Roman, in the couple's final decree of divorce. In five issues, Randy argues that the trial court (1) failed to declare the rights of the parties pursuant to a contract; (2) erred in awarding the three frozen embryos to Augusta; (3) erred in failing to make findings of fact and conclusions of law concerning constitutional issues; (4) violated his constitutional rights by awarding the frozen embryos to Augusta; and (5) erred in awarding frozen embryos to Augusta when Randy had withdrawn his consent.

We reverse and remand the cause.

Background

Augusta and Randy married on July 5, 1997. After a few years of marriage, the parties began trying to have children. When the traditional avenues of childbirth proved unsuccessful, the parties tried artificial insemination. Several attempts at artificial insemination likewise proved unsuccessful.

In August 2001, the parties met with Dr. Vicki Schnell, the Medical Director at the Center of Reproductive Medicine (the "Center"). Augusta had laparoscopic surgery and three more attempts at

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of art denoting cryogenically-preserved preembyos." Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?*, 27CONN. L. REV. 1377 n.4 (1995).

artificial insemination, but was still unsuccessful at getting pregnant.

Dr. Schnell then recommended that the parties try in vitro fertilization ("IVF"). The process of IVF "involves the aspiration of ova or oocytes from the follicles of a woman's ovaries and fertilization of these ova in a laboratory procedure using the husband's or donor's sperm. The resulting [embryos] are transferred to the uterus of the potential mother, whereupon a viable pregnancy may occur. Because the IVF procedure frequently produces more [embryos] than safely may be transferred at one time, the extra [embryos] may be frozen for future use through a process called cryopreservation." *In the Interest of O.G.M.*, 988 S.W.2d 473, 474 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd).

On March 27, 2002, the parties signed a number of documents at the Center, including one entitled "Informed Consent for Cryopreservation of Embryos" ("embryo agreement"). In this document, the parties authorized the storage of the embryos in a frozen state until the Center determined that appropriate conditions existed for transfer of the embryos to the woman's uterus and both husband and wife agreed to the transfer. In addition, the parties chose to discard the embryos in case of divorce. The document also contained a provision that allowed the parties to withdraw their consent to the disposition of the embryos and to discontinue their participation in the program.

On April 17, 2002, thirteen eggs were extracted from Augusta. Six of these eggs were successfully fertilized with Randy's sperm, resulting in six embryos. Of the six embryos that were fertilized, only three reached a stage of development to warrant the cryopreservation process. Dr. Schnell scheduled Augusta's implantation for April 20. On the night before the implantation, Randy expressed feelings to Augusta that led him to withdraw his consent to the implantation scheduled for the next day. The next day, the parties told Dr. Schnell that Augusta would not undergo the implantation procedure. A month after they decided to wait, the parties signed an agreement to unfreeze three embryos and implant them. The agreement was contingent on the parties' obtaining approval from a counselor. That agreement never took effect because Randy and Augusta did not progress through counseling.

On December 10, 2002, Randy filed for divorce and Augusta filed a counterclaim for divorce that included claims for fraud and intentional infliction of emotional distress.[2] The parties reached a final binding agreement during mediation as to the division of the marital property, except for the frozen embryos. At trial, Randy asked the trial court to uphold their written agreement, which specified that the embryos be discarded. Augusta wanted the opportunity to have the embryos implanted so that

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[2] In its modified decree of divorce, the trial court entered a take-nothing judgment on Augusta's fraud and intentional infliction of emotional distress causes of action. Augusta does not appeal the trial court's findings on these issues.

she could have a biological child.[3] If any children were born from the embryos, Augusta stated that Randy would not have parental rights or responsibilities. The day after the trial ended, the trial court ordered that Augusta take possession of the remaining three embryos. After the trial court awarded the embryos to Augusta, Randy complied with section 160.706(a) of the Texas Family Code, which allows him to seek parental rights to any child born from the embryos. *See* TEX. FAM. CODE ANN. § 160.706(a) (Vernon 2002).

On March 29, 2004, Randy filed a motion for new trial and a request for findings of fact and conclusions of law regarding the award of the frozen embryos to Augusta.[4] The trial court signed its first set of findings on April 26, 2004. The trial court's pertinent findings of fact provide as follows:

> 1. Three embryos, now frozen, were created during the marriage using the sperm of Randy Roman and the eggs of Augusta Roman.
>
> 2. The parties signed a mediation agreement addressing all issues involving the division of community

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[3] Dr. Schnell testified that Augusta has a 10% chance of becoming pregnant if the embryos are transferred to her.

[4] Randy asserts that he inadvertently submitted this set of findings of fact and conclusions of law. In two of his issues on appeal (the first and third), Randy asks us to abate the appeal to have the trial court make additional findings of fact and conclusions of law.

> property except for the three frozen embryos.
>
> 3. The three frozen embryos are community property.

The trial court's conclusions of law state:

> 1. The division of the community property agreed to by Petitioner and Respondent in their mediation agreement and the award to Respondent of the three frozen embryos as set forth in the Modified Final Decree of Divorce is just and right and a fair and equitable division of the community property.

On May 13, 2004, the trial court signed a second and more thorough set of findings submitted by Augusta. The record reflects that Randy never filed a request for additional findings.[5]

The trial court's second set of findings of fact state, in relevant part the following:

> 13. The Court considered all evidence and testimony in balancing the constitutional rights of both parties in making the award of the three (3)

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[5] Randy asserts that he never knew that the trial court signed the first or second set of findings.

frozen embryos to AUGUSTA N. ROMAN.

14. The Court considered all evidence and testimony regarding documents the parties signed with the Center of Reproductive Medicine . . . .

The second set of conclusions of law states,

7. The award of three (3) embryos to [Augusta] is part of a just and right division of the community estate having due regard for the constitutional rights of each party.

8. The order for the Center of Reproductive Medicine to surrender the three (3) frozen embryos to [Augusta] is necessary to effect a just and right division of the community estate.

Analysis

In this case of first impression in Texas, we consider the merits of the trial court's award of frozen embryos to Augusta as part of a "just and right" division of community property in light of the parties' prior written agreement to discard the embryos. We answer the issue with which we are presented as narrowly as possible in anticipation

that the issue will ultimately be resolved by the Texas Legislature.[6]

Award of Embryos

In his second issue on appeal, Randy argues that the trial court erred when it awarded the three frozen embryos to Augusta because the award violated the parties' embryo agreement. Randy contends that the agreement clearly provided for disposal of the frozen embryos in the case of divorce and that the trial court erred by not enforcing the agreement. Randy points to the following specific provisions in the embryo agreement:

> 2. We consent and authorize the embryo(s) to be stored in a frozen state until Dr. Schnell and the IVF Laboratory determine that appropriate conditions exist for transfer of the

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[6] At least three states have enacted legislation addressing frozen embryos. *See, e.g.*, FLA. STAT. ANN. § 742.17 (couples must execute written agreement providing for disposition in event of death, divorce or other unforeseen circumstances); N.H. REV. STAT. ANN. §§ 168-B: 13-168-B: 15, 168-B: 18 (couples must undergo medical examinations and counseling; 14-day limit for maintenance of *ex utero* pre-zygotes); LA. REV. STAT. ANN. §§ 9:121-9:133 (pre-zygote considered "juridical person" that must be implanted); *see also* TEX. FAM. CODE ANN. §§ 160.102(2) (defining assisted reproduction), 160.706 (entitled "Effect of Dissolution of Marriage") (Vernon 2002), § 160.754(e) (Vernon Supp. 2005) (stating that parties to gestational agreement must enter into agreement before the 14th day preceding the transfer of embryos).

> embryo(s) to the wife's uterus and both husband and wife agree to the transfer.
>
> * * *
>
> 10. If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken:
>
> The frozen embryo(s) shall be . . . Discarded.

Randy argues that these provisions of the embryo agreement allow transfer of the embryos only if both parties agree and that the trial court erred by not enforcing the agreement and ordering the embryos destroyed.[7] Randy also argues that no

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[7] We note that the parties also agreed in the embryo agreement that the frozen embryos would be their "joint property." Section seven of the agreement states,

> 7. We understand that legal principles and requirements regarding IVF and embryo freezing have not been firmly established. There is presently no state legislation dealing specifically with these issues. We have been advised that each embryo resulting from the fertilization of the wife's oocytes by the husband's sperm shall be the joint property of both partners based on currently accepted principles regarding legal ownership of human sperm and oocytes. We are aware that these regulations may change at any time.

evidence or insufficient evidence supports a finding that the embryo agreement was not enforceable or invalid. Although no Texas case has ruled on whether these types of agreements are enforceable, Randy contends that other jurisdictions have held that similar agreements are enforceable.

Augusta does not dispute that she signed and initialed the embryo agreement. She does dispute, however, the agreement's validity and the interpretation of the agreement. Specifically, Augusta argues that the trial court could have chosen not to enforce the agreement because other state supreme courts have found agreements similar to the one at issue here invalid. Because this issue has not been decided by any court in Texas, we will review the scant case law on the issue.

Prior cases involving frozen embryos

All but one of the cases surveyed involved an oral or written agreement regarding disposition of frozen embryos. In *Davis v. Davis*, the earliest case, the husband and wife did not have an agreement for the disposition of the embryos. 842 S.W.2d 588, 589 (Tenn. 1992), *cert. denied sub nom, Stowe v. Davis*, 507 U.S. 911, 113 S. Ct. 1259 (1993). The trial court awarded custody of the frozen embryos to the wife, but the court of appeals reversed on the ground that

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This section acknowledges that Texas laws regarding legal ownership of frozen embryos could change and that this area of the law continues to develop. Because it is not necessary to the disposition of this appeal, we do not address the parties' characterization of the frozen embryos as "joint property."

the husband had a constitutional right not to beget a child. *Id.* at 589. In affirming the judgment of the court of appeals, the Supreme Court of Tennessee ultimately chose to weigh the interests of each party and concluded that the husband's interest in avoiding parenthood was more significant than the wife's interest in donating the embryos to another couple for implantation. *Id.* at 604.

Although the parties did not have an agreement concerning disposition of the frozen embryos, the court discussed the enforceability of a contract in this situation. The court stated, "an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors." *Id.* at 597. The court further stated that,

> [W]e recognize that life is not static, and that human emotions run particularly high when a married couple is attempting to overcome infertility problems. It follows that the parties' initial 'informed consent' to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds. Providing that the

> initial agreements may later be modified by agreement will, we think, protect the parties against some of the risks they face in this regard. But, in the absence of such agreed modification, we conclude that their prior agreements should be considered binding.

Id. at 597 (emphasis in original).

In *Kass v. Kass*, prior to implantation, the parties signed a consent form which stated that the frozen embryos would not be released from storage without the written consent of both parties. 696 N.E.2d 174, 176 (N.Y. 1998). Another part of the consent agreement provided that if the parties could not reach a mutual decision on the frozen embryos, the embryos would be donated to research. *Id.* at 177. Before filing suit, the wife decided that she opposed the destruction of the embryos. *Id.* The trial court awarded custody of the embryos to the wife and directed her to implant them within a medically reasonable time. *Id.* The appellate division reversed. It unanimously agreed that the consent agreement regarding the disposition of unused fertilized eggs should control. *Id.* A two-justice plurality found that the parties' consent agreement indicated their desire to donate the embryos for research purposes if they could not both consent to the embryos' disposition. *Id.*

The highest court of New York affirmed the lower court's holding that the parties' consent agreement should control. The court noted that the parties had expressed their intent that if they could not agree on the embryos' disposition, they would be donated for research purposes. *Id.* at 178. It stated, "[P]arties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions." *Id.* at 180. The court further stated,

> Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF programs.

Id.

A New Jersey appellate court, by contrast, rejected an alleged oral agreement to procreate as against public policy. *See J.B. v. M.B.*, 751 A. 2d 613, 615 (N.J. Super. Ct. App. Div. 2000). In *J.B. v. M.B.*, the husband wanted to preserve the frozen embryos for his use or that of an infertile couple. 751 A. 2d at 615. The wife wanted the frozen embryos destroyed,

and she did not want her former husband to retain them for his own use or to donate them to anyone else. *Id.* at 616. The trial court ruled in favor of the wife, who wanted the embryos destroyed, because the family unit was no longer intact. *Id.*

The appellate court balanced the wife's right not to become a parent with the husband's right to procreate using the embryos under the Fourteenth Amendment and concluded that the husband's right would not be impaired if the embryos were destroyed because he still would be able to father children. *Id.* at 618–19. Thus, even if the Fourteenth Amendment applied, the court rejected the husband's argument that his constitutional rights would be violated if the embryos were destroyed. *Id.* at 619. The appellate court further held that a contract to procreate is contrary to New Jersey public policy and is unenforceable. *Id.* The court thus affirmed the trial court's order that the frozen embryos be destroyed. *Id.* at 620.

The Supreme Court of New Jersey affirmed, but modified the court of appeals' holding, recognizing "that persuasive reasons exist for enforcing preembryo disposition agreements." *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001). The supreme court held that the parties' consent agreement did not "manifest a clear intent by [the parties] regarding disposition of the preembryos in the event of a dissolution of their marriage." *Id.* at 713 (internal quotations omitted). In reaching its ultimate holding, the court considered the constitutional rights of the parties and stated that,

"[w]e will not force [the wife] to become a biological parent against her will." *Id.* at 717. The court held that it will "enforce agreements entered into at the time in vitro fertilization [has] begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos." *Id.* at 719. If the parties disagree about disposition because one party has reconsidered their decision, the court stated, "the interests of both parties must be evaluated."[8] *Id.*

In *A.Z. v. B.Z.*, before the eggs were retrieved from the wife, the parties signed consent forms. 725 N.E.2d 1051, 1053–54 (Mass. 2000). The wife filled out the form, which stated that if they "[s]hould become separated, [they] both agree[d] to have the embryo(s) . . . return[ed] to [the] wife for implant." *Id.* at 1054. The court noted that the husband always signed a blank consent form. *Id.* After the husband signed the consent form, the wife would fill in the disposition and sign the form herself. *Id.*

The trial court permanently enjoined the wife from utilizing the frozen embryos held in cryopreservation. The supreme judicial court stated that "in view of the purpose of the form (drafted by and to give assistance to the clinic) and the circumstances of execution, we are dubious at best

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[8] The court also stated, "We express no opinion in respect of a case in which a party who has become infertile seeks use of stored preembryos against the wishes of his or her partner, noting only that the possibility of adoption also may be a consideration, among others, in the court's assessment." 783 A.2d at 720.

that it represents the intent of the husband and the wife regarding disposition of the preembryos in the case of a dispute between them." *Id.* at 1056.

Specifically, the court stated that neither the form nor the record indicated that the parties intended the form to be a binding agreement. *Id.* Instead, the court interpreted the form only to "define the donors' relationship as a unit with the clinic." *Id.* In reaching its decision, the court also noted that the consent form did not contain a duration provision and that it could not assume that the donors intended their consent form to govern a disposition of frozen preembryos four years after it was executed. *Id.* at 1056–57.

The court also looked to the donors' conduct in connection with the execution of the consent forms and determined that their conduct created doubt that the consent form represented the intentions of both donors. *Id.* at 1057. Because the husband signed a blank form and the wife later filled in her choice regarding disposition of the frozen embryos, the court concluded that the consent form did not represent the true intentions of the husband. *Id.*

In *Litowitz v. Litowitz*, the husband and wife contracted with an egg donor and an IVF clinic. *See* 48 P.3d 261, 263 (Wash. 2002), cert. denied, 537 U.S. 1191, 123 S. Ct. 1271 (2003). After the husband's sperm fertilized three of the donor's eggs, the eggs were implanted, resulting in the birth of a child. Before the birth, however, the parties separated, and sued for divorce. At trial, the wife asked to be

awarded the remaining embryos to implant in a surrogate. The trial court awarded the embryos to the husband, who wanted to donate them to an out-of-state couple. The appeals court, in reviewing the egg donor contract, noted that it did not provide what would be done with the embryos if the parties could not agree or if they dissolved their marriage. The court concluded that the husband's right not to procreate compelled an award of the embryos to him. *Id.* at 265. The Supreme Court of Washington reversed, holding the parties to their preembryo cryopreservation contract, which provided that the remaining embryos would be thawed out, but not allowed to undergo further development, and that they would be disposed of after they had been maintained in cryopreservation for five years. *Id.* at 271.

The most recent case to consider the issue, *In re Marriage of Witten*, 672 N.W.2d 768, 771–72 (Iowa 2003), likewise focused on the embryo agreement. In *Witten*, the parties signed an embryo storage agreement with the IVF clinic prior to undergoing the IVF process. *Id.* at 772. The consent form provided that frozen embryos would be released only with the approval of both the husband and the wife. *Id.* The trial court concluded that the embryo storage agreement governed the dispute over the frozen embryos. *Id.* at 773. The parties were thus enjoined from taking any actions with the embryos unless both parties consented. *Id.*

The Iowa Supreme Court noted that the embryo agreement did not specifically address what would happen to the embryos upon divorce. *Id.* The court reviewed the three approaches that courts have used in resolving these types of disputes [9] and adopted the contemporaneous mutual consent model. *Id.* at 783. In adopting this model, the court found that it would be against Iowa public policy "to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos."[10] *Id.* at 781. Nevertheless, the court recognized that an embryo agreement between embryo donor and fertility clinics "serves an important purpose . . . ensuring that all parties understand their respective rights and obligations." *Id.* Given these different considerations, the court stated, "[W]e reject the contractual approach and hold that agreements entered into at the time in vitro fertilization is commenced are enforceable and binding on the parties, 'subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo,'" providing that any change of intention is communicated in writing to all parties. *Id.* at 782–83 (quoting *J.B.*, 783 A.2d at 719). Because the agreement did not address disposition of the embryos upon divorce and

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[9] The Iowa court stated that courts have used the following approaches to determine the disposition of frozen embryos: (1) a best interest test, (2) a contractual approach, and (3) a contemporaneous mutual consent model.

[10] The court concluded that embryos are "fundamentally distinct from the chattels, real estate, and money that are the subjects of antenuptial agreements." *Id.* at 781.

neither party could agree on the embryos' disposition, the court enjoined both parties from utilizing the embryos without the other's written consent. *Id.* at 783.

We are mindful of the cases that have addressed this issue and particularly what we see as an emerging majority view that written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable so long as the parties have the opportunity to withdraw their consent to the terms of the agreement. Because we are not bound by state law from other jurisdictions, however, we will also review our own statutes to determine the public policy of this State in the context of embryo agreements.

Public Policy of Texas

Currently, the State of Texas has laws regarding children of assisted reproduction and gestational agreements, both contained within the Uniform Parentage Act.[11] *See* TEX. FAM. CODE ANN. § 160.701-.707 (Vernon 2002), §§ 160.751-.763 (Vernon Supp. 2005). Assisted reproduction means a method of causing pregnancy other than sexual intercourse, including IVF and transfer of embryos. *Id.* § 160.102(2)(D) (Vernon 2002). The statute

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[11] The Uniform Parentage Act became effective on June 14, 2001. *See* TEX. FAM. CODE ANN. §§ 160.001-.763 (Vernon 2002 & Supp. 2005). The act governs every determination of parentage in Texas. *See id.* § 160.103(a) (Vernon 2002).

requires that both husband and wife consent to assisted reproduction. *Id.* § 160.704(a). However, section 160.704(b) acknowledges that a child may be born without the husband's consent. *Id.* § 160.704(b). Section 160.706 addresses paternity in the event of divorce as follows: "if a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child." *Id.* § 160.706(a). This section also provides that consent of the former spouse may be withdrawn at any time before the placement of eggs, sperm, or embryos. *Id.* § 160.706(b). Noticeably absent from these sections is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce. Nor is there anything in the case law that is incompatible with the recognition of the parties' agreement as controlling.

We also look to new legislation concerning gestational agreements. A gestational agreement is an agreement between a woman and the intended parents of a child in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction and which provides that the intended parents become the parents of the child. *See id.* § 160.752(a) (Vernon Supp. 2005). The statute specifically authorizes a gestational mother, her husband if she is married, each donor, and each intended parent to enter into a written agreement that relinquishes all parental rights of the gestational mother and provides that the intended

parents become the parents of the child. *See id.* § 160.754(a). The statute also requires that the parties to a gestational agreement must enter into the agreement before the 14th day preceding the date of transfer of eggs, sperm, or embryos to the gestational mother. *See* § 160.754(e). [12] Parental rights are transferred when a court validates the gestational agreement. *See id.* § 160.753(a), (b). To validate a gestational agreement, the court must find, in relevance to our issue, that each party to the agreement voluntarily entered into and understood the terms of the agreement. *Id.* § 160.756(b)(4). The statute also provides that "[b]efore a prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother, her husband if she is married, or either intended parent may terminate a gestational agreement. . . ." *Id.* § 160.759(a).[13]

We glean from these statutes that the public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in the event of a contingency, such as divorce, death, or changed circumstances. We agree with the New York Court of Appeals that "[a]dvance directives, subject to mutual change of mind that

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[12] Section (g) of this section provides that a gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo. *See* TEX. FAM. CODE ANN. § 160.754(g) (Vernon Supp. 2005).

[13] If the gestational mother terminates the gestational agreement, she is not liable to the intended parents. TEX. FAM. CODE ANN. § 160.759(d) (Vernon Supp. 2005).

must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." *Kass*, 696 N.E.2d at 180. These agreements should thus be "presumed valid and should be enforced as between the progenitors." *Davis*, 842 S.W.2d at 597; *Kass*, 696 N.E.2d at 180–181.

We believe that allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties. We hold, therefore, that an embryo agreement that satisfies these criteria does not violate the public policy of the State of Texas.

We now determine whether the embryo agreement in this case manifests a voluntary unchanged mutual intention of the parties regarding disposition of the embryos upon divorce.

Embryo Agreement

Absent ambiguity, we interpret a contract as a matter of law. *DeWitt County Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999). "Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered." *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996).

"If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "An ambiguity exists only if the contract language is susceptible to two or more reasonable interpretations." *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). The language in a contract is to be given its plain grammatical meaning unless doing so would defeat the parties' intent. DeWitt County Elec. Coop., 1 S.W.3d at 101. We presume that the parties intended every clause to have an effect. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996).

The following elements are required for the formation of a valid and binding contract: 1) an offer, 2) acceptance in strict compliance with the terms of the offer, 3) a meeting of the minds, 4) each party's consent to the terms, and 5) execution and delivery of the contract with the intent that it be mutual and binding. *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 555–56 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Consideration is also a fundamental element of every valid contract.[14] *Turner-Bass*

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[14] At least one commentator has suggested that the consideration in embryo agreements is the gamete donation process that both husband and wife experience. Marysol Rosado, *Sign on the Dotted Line: Enforceability of Signed Agreements, upon Divorce of the Married Couple, Concerning the Disposition of Their Frozen Preembryos*, 36NEW ENG. L. REV. 1041, 1069 (2002).

Assocs. of Tyler v. Williamson, 932 S.W.2d 219, 222 (Tex. App.—Tyler 1996, writ denied).

The evidence shows that the parties came to the Center on March 27, 2002 to sign a variety of forms. The parties received a cover page along with nine forms. [15] The cover page stated, "Many forms require careful thought regarding decisions you and your spouse will be asked to make." We focus our discussion on one of the documents entitled, "Informed Consent for Cryopreservation of Embryo."[16]

On page two, under the sub-heading "Consent for Cryopreservation," the document states,

> 1. We, Augusta Roman (wife) and Randy Roman (husband), the undersigned, hereby authorize and consent to the freezing of some or all of the remaining embryos that result from our participating in the IVF process.

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[15] The forms include: Informed Consent for Use of Oral Contraceptives, Informed Consent for Intracytoplasmic Sperm Injection, Request for and Consent for Anesthesia, Informed Consent for Cryopreservation of Embryos, IVF Clinical Contract, Pre-Pay IVF Contract, Informed Consent for the Use of Estrace and Progesterone in IVF, In Vitro Fertilization and Embryo Transfer Informed Consent, and Informed Consent for Assisted Hatching.

[16] Page 1 of the agreement provides that after the embryos are cryopreserved they will be maintained for up to three years, unless the decision to thaw them sooner is made or cryopreservation is terminated. Neither party relies on this section of the agreement.

> 2. We consent and authorize the embryo(s) to be stored in a frozen state until Dr. Schnell and the IVF Laboratory determine that appropriate conditions exist for transfer of the embryo(s) to the wife's uterus and both husband and wife agree to the transfer.

On page three, the document states,

> 7. We understand that legal principles and requirements regarding IVF and embryo freezing have not been firmly established. There is presently no state legislation dealing specifically with these issues. We have been advised that each embryo resulting from the fertilization of the wife's oocytes by the husband's sperm shall be the joint property of both partners based on currently accepted principles regarding legal ownership of human sperm and oocytes. We are aware that these regulations may change at any time.
>
> 8. We hereby authorize and require that the actions we have marked below be taken if either or both of us should die while any of our frozen embryos are still in possession of the Center of Reproductive Medicine IVF Program. We consent to the following: If only one of us survives, the surviving spouse

> shall have full authority to decide what is to be done with the embryo(s).
>
> 9. We understand that if both of us die, the frozen embryo(s) will be discarded.

On page four, the document states,

> 10. If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken:
>
> The frozen embryo(s) shall be . . . Discarded.[17]
>
> 11. If other circumstances arise whereby embryos remain which are not used for the purpose of attempting to initiate a pregnancy in the wife or if the husband and wife are not able to agree on disposition of remaining embryos for any reason, we hereby authorize and direct that the unused frozen embryo(s) will be discarded.

On page five, the document states,

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[17] The embryo agreement also gave the parties the option of releasing the frozen embryos to either Randy or Augusta, which they declined.

> 16. We agree and acknowledge that we are voluntary participants, but we understand that we are free to withdraw our consent as to the disposition of our embryo(s) and to discontinue participation by requesting relocation of our embryo(s) to another suitable location at any time without prejudice.
>
> 20. Our questions regarding these procedures have been answered to our satisfaction. Our participation is voluntary. We understand that we may withdraw our consent at any time prior to the procedure. We have read and understand this form. We have received a copy of this form.

Neither party disputes that he or she signed the agreement or initialed the bottom of each page of this agreement. They also do not dispute that each one of them specifically initialed section 8 (embryo disposition in the event of a death) and section 10 (embryo disposition in the event of divorce). They also do not dispute that their frozen embryos were still in the program or that, when they filed for divorce, they had not withdrawn consent as to the disposition of the embryos and discontinued in the participation in the program.

Rather, Augusta argues that she understood the embryo agreement to apply to remaining embryos only after implantation had occurred. She testified that she never agreed to destroy all the embryos without an opportunity to get pregnant. Although she does not refer specifically to it in her brief, Augusta is apparently relying on the first section of the embryo agreement, entitled Consent for Cryopreservation. This section provides, "[The parties] hereby authorize and consent to the freezing of some or all of the remaining embryos that result from our participation in the IVF process." We disagree with Augusta's interpretation of the embryo agreement.

For this Court to follow Augusta's interpretation, we would necessarily have to impute language to the contract that is not present and disregard language that is. Specifically, Augusta would have us read the clause as stating that "the parties hereby authorize and consent to the freezing of some or all of the remaining embryos [after an initial set of embryos is implanted] that result from our participating in the IVF process." In an unambiguous contract, we will not imply language, add to language, or interpret it other than pursuant to its plain meaning. *See Schaefer*, 124 S.W.3d at 162; *Natural Gas Clearinghouse v. Midgard Energy Co.*, 113 S.W.3d 400, 407 (Tex. App.—Amarillo 2003, pet. denied).

Section 10 of the agreement specifically states, "If we are divorced or either of us files for divorce while any of our frozen embryos are still in the

program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken: The frozen embryo(s) shall be . . . Discarded." (Emphasis added). Although the parties could have chosen to release the frozen embryos either to Randy or Augusta, they chose the option to discard the frozen embryos in the event of divorce.

The embryo agreement's language could not be clearer. Section 10 specifically addresses the disposition of the frozen embryos in the event of a divorce. It is undisputed that Augusta and Randy both signed the entire embryo agreement, and they both initialed section 10. The evidence shows that the parties considered this section and did not sign it without thought.

Randy testified that before signing the embryo agreement, he and Augusta discussed their options about what would happen to the embryos upon divorce. Randy stated that they were both excited about taking the next step forward, but also nervous. Randy did not notice that Augusta was too emotionally upset to give consent. He also testified that they did not disagree as what to do in the event of a divorce. He further testified that no coercion, threats, bribery, or promises were used to make them sign the embryo agreement.

Dr. Schnell testified that the purpose of the cryopreservation form was to determine the parties' desires for the disposition of their embryos upon certain events such as divorce or death. Dr. Schnell testified that the couple had chosen to have the

embryos discarded in the event that they divorced. On the day the parties signed the consent forms, Dr. Schnell testified that Augusta "was able to participate in the consult, and that she was able to understand the questions that I asked her, and she was able to state that she did initial those and that she understood the consents and that all her questions were answered concerning the process." At that time, Dr. Schnell did not notice any outward signs of an emotional problem that would prevent Augusta from understanding and making an informed consent.

Augusta testified that she would have signed anything to move forward because her goal was to have a child. She testified that it was possible that because she was taking birth control pills she was not in the right mental state to understand the agreement. Augusta further stated that she understood the agreement, "but I wasn't focusing on much on the [inaudible] to the outcome of the whole process of having a child." She also stated that no one was putting any force, coercion or threats on either of the parties to sign the agreement. She understood that one of the options she had been offered was to give the embryos to herself in the event of divorce. Augusta testified that she signed the agreement with the Center. When asked whether she and Randy had had a meeting of their minds as to what would happen in the unlikely event that they ever divorced, Augusta responded, "We didn't talk about divorce. I mean, it wasn't even a remote—it wasn't a conversation that we had. He signed and I signed—and I initialed it." She was also

asked, "So you and Randy Roman never had an agreement on what would happen if you divorce, what would happen to the embryos if you divorced." She responded, "No, we didn't have a discussion." Augusta clarified that they did not have an agreement, other than that expressed in the consent form with the center.

"[P]arties strike the deal they choose to strike and, thus, voluntarily bind themselves in the manner they choose." *Natural Gas*, 113 S.W.3d at 407. Although Augusta's choice may not have been fully considered, the evidence shows that she was aware of and understood the significance of her decision. The parties' embryo agreement clearly indicates their wishes in the event of divorce. We conclude that the parties' embryo agreement was not ambiguous so as to preclude a meeting of the minds.

Our conclusion that section 10 shows a meeting of the minds is bolstered by section 8 of the embryo agreement, which provides that in the event that one or both of the parties should die, they agree to give the embryos to the surviving spouse even though they could have chosen to discard the embryos. The parties' choice to give the surviving spouse full authority over the embryos indicates that the parties were aware of other options in the agreement. The agreement shows that when the parties wanted to discard the embryos, they made that choice. When the parties wanted to give the embryos to one party, they made that choice. In fact, the embryo agreement shows that at some point in signing section 8, Augusta's initials were on the

option that would have discarded the embryos. Her initials were subsequently crossed out and re-entered on the choice giving the surviving spouse full authority for the embryos.

We also ~~note~~ that section 11 is applicable to this dispute. Section 11 states, "[I]f the husband and wife are not able to agree on disposition of remaining embryos for any reason, we hereby authorize and direct that the unused frozen embryo(s) will be discarded." Even without section 10, which clearly provides the course of action in the event of divorce, section 11 would also inform the trial court of what to do in the event of a contingency when the parties could not agree.

Texas statutory law and section 16 of the embryo agreement allow a party to withdraw consent to assisted reproduction procedures. *See* TEX. FAM. CODE ANN. § 160.706(b) (Vernon 2002) (stating that consent may be withdrawn at any time before the placement of eggs, sperm, or embryos). Neither Randy nor Augusta withdrew consent to the provision in the embryo agreement that the frozen embryos were to be discarded in the event of divorce. Nor did they withdraw consent to the provision within section 11 of the embryo agreement—that if the parties could not agree on the disposition of the embryos, the frozen embryos were to be discarded. Rather, their embryos were still in the program, and

the embryo agreement was still in effect when the parties divorced.[18]

Augusta also argues that Randy "breached the intent and purpose of the IVF agreements, thereby invalidating any decisions made by Mrs. Roman based upon her belief that the entire *agreement* would be honored." (Emphasis in original.) Augusta does not cite any argument or authority for this proposition. Therefore, we will not consider it on appeal. *See* TEX. R. APP. P. 38.1(h).

Augusta also argues that the embryo agreement did not reflect a meeting of the minds and was not a valid agreement concerning the disposition of the embryos. She reasons that because Randy deceived her as to his true state of mind, there could be no meeting of the minds. Although there was evidence that Randy had been upset with Augusta in the two years prior to the scheduled implantation, we cannot see how this precludes a meeting of the minds in regard to their mutual decision for the disposition of their embryos in the event of a divorce. *See CU Lloyd's of Texas v. Hatfield*, 126 S.W.3d 679, 682 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("If a written contract is so worded that it can be given a definite or certain legal meaning, then it is unambiguous, and [we] may not consider parol

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[18] Randy argues in his fifth issue that the trial court erred in awarding the embryos to Augusta after he had withdrawn his consent to their implantation. We note that Randy's withdrawal of consent to implantation of the embryos on April 20, 2002 did not constitute repudiation of the embryo agreement and withdrawal from the program.

evidence as to the parties' intent."). Randy's deceit may have been relevant for proving fraud, but the trial court found against Augusta on that issue.

Augusta additionally argues that because the Center agreed to do whatever the Court ordered it to do, the Center's actions supersede the Center's cryopreservation document and render it moot. Augusta does not state why the embryo agreement is rendered moot, nor does she cite any authority for the proposition. We decline to address her argument. *See* TEX. R. APP. P. 38.1(h).

We hold that the embryo agreement provides that the frozen embryos are to be discarded in the event of divorce. By awarding the frozen embryos to Augusta, the trial court improperly rewrote the parties' agreement instead of enforcing what the parties had voluntarily decided in the event of divorce. Accordingly, the trial court abused its discretion in not enforcing the embryo agreement.

We sustain Randy's second issue.[19]

Because Randy's second issue is dispositive, we decline to address Randy's remaining issues. *See* TEX. R. APP. P. 47.1.

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[19] Because we find that the embryo agreement is unambiguous as a matter of law and that its interpretation is therefore a matter of law for the Court, we do not address Randy's first issue, objecting to the trial court's failure to declare the rights of the parties pursuant to a contract. *See* TEX. R. APP. P. 47.1.

Conclusion

We reverse the judgment and remand the cause to the trial court to enter an order consistent with this opinion and with the parties' agreement that the frozen embryos be discarded. All pending motions are denied.

Evelyn V. Keyes
Justice

Panel consists of Justices Taft, Keyes, and Hanks.

NO. 2002-62153

IN THE MATTER OF THE MARRIAGE OF	§	IN THE DISTRICT COURT
	§	
	§	
RANDY M. ROMAN	§	310 JUDICIAL DISTRICT
AND	§	
AUGUSTA N. ROMAN	§	HARRIS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, RANDY M. ROMAN, submitted a request to the Court to make and file Findings of Fact and Conclusions of Law on March 29, 2004. Petitioner, RANDY M. ROMAN filed Notice of Past Due Findings of Fact and Conclusions of Law on April 7, 2004, only 9 days after the original request and prior to the deadline for the Original Findings of Fact and Conclusions of Law. Petitioner, without notice to Respondent, filed his own Findings of Fact and Conclusions of Law which the Judge signed on April 26, 2004. The Court's deadline to file Findings of Fact and Conclusions of law (sic) is May 8, 2004. The Court, in accordance with Rules 296 and 297 of the Texas Rules of Civil Procedure and Sections 6.711, 6.602, 6.706, 7.001,7.006, 160, 9.014, 106.002, 3.002, and 3.003 of the Texas Family Code, timely files these Findings of Fact and Conclusions of Law.

Findings of Fact

1. RANDY M. ROMAN, Petitioner, and AUGUSTA M. (sic) ROMAN, respondent, were married on July 5, 1997.

2. At the time of the filing of this suit, RANDY M. ROMAN had been a domiciliary of Texas for six months and a resident of Harris County for 90 days.

3. The marriage of Petitioner and Respondent has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.

4. The trial court, after examining the record and hearing the evidence and argument of counsel, finds that it has jurisdiction of this case and of all parties and that no other court has continuing, exclusive jurisdiction of this case. All questions of fact and of law were submitted to the Court. All persons entitled to citation were properly cited.

5. The trial court finds that Petitioner, RANDY M. ROMAN, appeared in person and through attorney of record, GREG B. ENOS, and announced ready for trial.

6. The trial court finds that Respondent, AUGUSTA N. ROMAN, appeared in person and through attorney of record, REBECCA L. REITZ and JOHN F. GAY, and announced ready for trial.

7. The trial court finds that Co-Respondent, VICKI SCHNELL, M.D. and Third Party Respondent, The Center of Reproductive Medicine, and attorneys, GORDON M. CARVER, III AND HEATHER MORLANG appeared in person and announced ready for trial.

8. On the 8th day of December, 2003, the above referenced case was called to trial. Testimony commenced on December 8, 2003 and concluded on February 3, 2004. The court judicially PRONOUNCED AND RENDERED its ruling in open court at Houston, Harris County, Texas, on February 4, 2004, and further noted its ruling on the court's docket sheet on the same date. A final Decree of Divorce was signed by the Court on the 20th day of February, 2004. The Court subsequently considered Vicki Schnell, M.D. and Center of Reproductive Medicine's Joint Motion to Modify the Judgment on February 27, 2004. The court vacated the Final Decree of Divorce signed February 20, 2004 and a Modified Final Decree of Divorce was signed on the 9th day of March, 2004.

9. The court finds that it signed Agreed Temporary Orders Pending Appeal which enjoins the parties from destroying, implanting, unfreezing, transferring, donating, using or in any way changing the current status of the three frozen embryos created using eggs from AUGUSTA N. ROMAN and sperm form RANDY M. ROMAN which are now in the possession of The Center of Reproductive Medicine at 450 Medical Center Boulevard, Webster,

Texas until the Modified Final Decree of Divorce is a final order and no appeals are pending.

10. The court finds that the parties have entered into a written mediated settlement agreement regarding the division of their community estate, save and except the three frozen embryos, and grants final judgment based upon the agreement.

11. The Court finds that the community property of the parties also includes three (3) frozen embryos that were created using AUGUSTA N. ROMAN'S eggs and RANDY M. ROMAN'S sperm. The Court finds that the three (3) frozen embryos are now in the possession of the Center of Reproductive Medicine, 450 Medical Center Boulevard, Webster, Texas 77598.

12. The Court finds that as part of a just and right division of the community property of the parities the court awards all right, title and interest in and to the three (3) frozen embryos to AUGUSTA N. ROMAN.

13. The court considered all evidence and testimony in balancing the constitutional rights of both parties in making the award of the three (3) frozen embryos to AUGUSTA N. ROMAN.

14. The Court considered all evidence and testimony regarding documents the parties signed with the Center of Reproductive Medicine and finds that the Center of Reproductive Medicine shall surrender, in

compliance with any applicable local, state, or federal laws or regulations, the three (3) frozen embryos to AUGUSTA N. ROMAN, or her designee, at the Center of Reproductive Medicine, 450 Medical Center Boulevard, Webster, Texas 77598, or at such other place designated by her, before the end of the 24th hour after the Center of Reproductive Medicine receives a written demand from Augusta N. Roman that the Center of Reproductive Medicine surrender the 3 frozen embryos to her.

15. The Court finds that Vicki Schnell, M.D. and the Center of Reproductive Medicine are released from any liability for any acts occurring after surrender of the three (3) frozen embryos to AUGUSTA N. ROMAN.

16. The Court finds AUGUSTA N. ROMAN take nothing on her tort claims asserted against RANDY M. ROMAN for the Intentional Infliction of Emotional Distress and Actual Fraud.

17. The Court finds that RANDY M. ROMAN and AUGUSTA N. ROMAN shall each be responsible for his or her own attorney's fees, expenses, and costs incurred as a result of legal representation in this case.

18. The Court finds that Vicki Schnell, M.D. and the Center of Reproductive Medicine recover from RANDY M. ROMAN attorney's fees in the some of $1,000.00 due and payable by May 1, 2004. The court grants judgment against RANDY M. ROMAN and in favor of VICKI SCHNELL, M.D. and the

Center of Reproductive Medicine in the amount of $1,000.00 for attorney's fees with interest to accrue after May 1, 2004 at the maximum legal rate for which let execution issue if not timely paid.

19. The Court finds that Vicki Schnell, M.D., and the Center of Reproductive Medicine recover from AUGUSTA N. ROMAN attorney's fees in the sum of $1,000.00 due and payable by May 1, 2004. The court grants judgment against AUGUSTA N. ROMAN and in favor of VICKI SCHNELL, M.D. and the Center of Reproductive Medicine in the amount of $1,000.00 for attorney's fees with interest to accrue after May 1, 2004 at the maximum legal rate for which let execution issue if not timely paid.

20. The Court finds that AUGUSTA N. ROMAN'S request to change her name to AUGUSTA NZOIWU shall be granted.

21. Any finding of fact that is a conclusion of law shall be deemed a conclusion of law.

Conclusions of Law

1. The Original Petition for Divorce filed by RANDY M. ROMAN and the counterclaim for divorce filed by AUGUSTA N. ROMAN are in due form and contain all the allegations required by law.

2. This Court has jurisdiction of the parties and of the subject matter of this case.

3. All legal prerequisites to granting a divorce have been met.

4. The divorce is granted on the ground of insupportability.

5. The Court accepted a mediated settlement agreement dividing all community and separate property, save and except the three (3) frozen embryos pursuant to TFC 7.006.

6. The Court has the authority under TFC 7.001 to divide the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

7. The award of the three (3) frozen embryos to AUGUSTA N. ROMAN is part of a just and right division of the community estate having due regard for the constitutional rights of each party.

8. The order for the Center of Reproductive Medicine to surrender the three (3) frozen embryos to AUGUSTA N. ROMAN is necessary to effect a just and right division of the community estate.

9. The court has the authority under sections 9.014 and 106.002 of the Texas Family Code to award attorney's fees.

10. The court has the authority to grant AUGUSTA N. ROMAN a change of name under TFC 6.706.

11. Any conclusion of law that is a finding of fact shall be deemed a finding of fact.

SIGNED on the ___ day of May 13, 2004 (stamped), 2004.

/s/ Lisa Millard
THE HONORABLE LISA MILLARD

THE SUPREME COURT OF TEXAS

Orders Pronounced October 12, 2007

. . .

ORDERS ON MOTIONS FOR REHEARING

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

. . .

06-0554 AUGUSTA ROMAN v. RANDY M. ROMAN; from Harris County; 1st district (01-04-00541-CV, 193 SW3d 40, 02-09-06)

THE SUPREME COURT OF TEXAS

Orders Pronounced August 24, 2007

. . .

ORDERS ON PETITIONS FOR REVIEW

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FILED
FEB 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-926

In The Supreme Court of the United States

AUGUSTA N. ROMAN,

Petitioner,

v.

RANDY M. ROMAN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

BRIEF FOR RANDY M. ROMAN IN OPPOSITION

GREG B. ENOS*
THE ENOS LAW FIRM, P.C.
17207 Feather Craft Lane
Webster, Texas 77598
(281) 333-3030

THERESA M. ERICKSON
ERICKSON LAW, P.C.
14269 Danielson Street, Suite 101
Poway, California 92064
(858) 748-4133

Counsel for Respondent Randy M. Roman

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether prospective parents, by signing a standard contract required by almost all fertility clinics before they begin the *in vitro* fertilization process, can waive whatever constitutional rights to procreate they may have in the event of divorce?

2. Whether the right to procreate of a woman, who has less than a 1% chance of successfully using frozen pre-embryos to create a child and who has other much more likely options for having children, can outweigh the right of a man who does not want to be forced by the government or his ex-wife to have a child against his will?

3. Does the U.S. Constitution even recognize an absolute right to procreate that justifies overruling the decisions of all state courts that have addressed disputes over frozen pre-embryos, not to mention the European Court of Human Rights?

4. Should the *in vitro* fertilization industry be fundamentally changed by ruling unenforceable the almost universally used agreements between clinics and prospective parents concerning disposition of frozen pre-embryos?

PARTIES TO THE PROCEEDING

Petitioner is Augusta N. Roman. Respondents are Randy M. Roman, Vicki Schnell, M.D. and The Center for Reproductive Medicine.

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INTRODUCTION

Increasing infertility rates and the advance of reproductive technologies are affecting the way that we think about parenting and children. In fact, infertility affects about 10 percent of the reproductive population – approximately 6.1 million women.[1] It affects people of all backgrounds and men and women equally. Although age can be a factor, sexually transmitted diseases, exposure to certain chemicals, tobacco usage, alcohol abuse, or excessive weight gain or loss can all be factors for infertility.[2] Since Louise Brown, the world's first "test tube baby," was born in 1978, the field of assisted reproduction has given our society a new way to create their families where these factors exist and affect their ability to have children. Unfortunately, these new medical technologies have developed so quickly that the laws, at both the state and federal level, have been unable to keep on par with their continual development.

In response to these increasing infertility rates, Assisted Reproductive Technologies, or ART, have developed to enable physicians to manipulate eggs

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[1] Centers for Disease Control/National Center for Health Statistics, "Fertility, Family Planning, and Women's Health: New Data From the 1995 National Survey of Family Growth," *Vital and Health Statistics*, Series 23, No. 19, May 1997. Updated statistics at http://www.cdc.gov/nchs/fastats/fertile.htm.

[2] Arons, J., "Future Choices, Assisted Reproductive Technologies and the Law," Center for American Progress, 2007. http://www.americanprogress.org/issues/2007/12/future_choices.html.

and sperm outside of the human body. IVF, or *in vitro* fertilization, is the most utilized medical procedure where eggs and sperm are joined in a petri dish and later transferred to a woman's uterus.

Typically, fertility hormones are used by the woman to stimulate egg production in the ovaries via a series of injections over the course of a three to four week period. Once the eggs are matured, they are then retrieved vaginally by inserting a needle into the ovaries that suctions the eggs out of the body. Sperm is then introduced to the egg naturally or via ICSI, intracytoplasmic sperm injection. Once the egg and sperm are joined, the pre-embryos[3] are then either transferred at day three or five, with the remaining frozen for future use.

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[3] This Brief will use the proper term "pre-embryo" to describe the three frozen fertilized eggs at issue in this case. The Washington State Court of Appeals explained the difference between a pre-embryo and an embryo:

> *Fertilization takes several hours as the twenty-four chromosomes of each gamete (egg and sperm) fuse, yielding a zygote with a unique genome of forty-eight chromosomes. The zygote is then allowed to divide for about three days, until it reaches two to eight-cell stage. These preembryos, consisting of a few undifferentiated cells, are either implanted or cryopreserved for implantation at a later date. It is not until the cell mass proceeds beyond sixteen cells and implants that it can give rise to an embryo.*

Litowitz v. Litowitz, 10 P.3d 1086, 1088, n. 1 (Wash. Ct. App. 2000), *rev'd*, 48 P.3d 261 (Wash. 2002), *cert. denied*, 537 U.S. 1191 (2003).

As IVF is expensive and invasive, patients elect to retrieve as many eggs as possible, which in turn produces additional pre-embryos remaining cryopreserved, or frozen, for future use. This practice of freezing the remaining pre-embryos has led to the storage of hundreds of thousands of pre-embryos in clinics and laboratories throughout the country. It is estimated that there are over 400,000 pre-embryos now in storage across the United States, according to a survey conducted in 2003 by the Society of Assisted Reproductive Technology.[4]

While many of these remaining pre-embryos will be thawed and placed into a woman, many will remain frozen for years to come. The disposition of these hundreds of thousands of pre-embryos usually remains in the hands of the couple who created them; however, others are forgotten and some become the basis for a dispute when these couples divorce. In order to counter the unavailability of some couples or the inability of couples to reach a joint decision as to the fate of these pre-embryos, most IVF programs have couples determine in advance their choices for the disposition of their pre-embryos, whether they are later abandoned, the couple divorces, the couple fails to pay storage fees, or one or both of them die. It is

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[4] Hoffman, D., Zellman, G., Fair, C., Mayer, J., Zeitz, J., Gibbons, W., and Turner, T., "Cryopreserved Embryos in the United States and Their Availability for Research," *Fertility and Sterility* 79 (5): 1063-1069, May 2003. Summarized at http://www.rand.org/pubs/research_briefs/RB9038/index1.html.

only after these preliminary decisions are made that the IVF clinic will proceed with the egg retrieval, fertilization and freezing process. It is clear that the IVF programs intend for these advance directives, much like a health care advance directive, to help facilitate a resolution in the event of a dispute by permitting the couple, not the clinic, to decide the fate of the pre-embryos beforehand. In fact, most clinics and programs see these directives as providing "administrative convenience and efficiency."[5]

While undergoing their fertility treatments, Randy Roman and Augusta Roman encountered these advance directives with their own IVF clinic. They both signed these documents prior to moving forward with the treatment that they had anticipated would give them the child they had wanted. Unfortunately, prior to the first pre-embryo transfer into Augusta Roman's uterus, the couple decided to divorce. The only contested issue was their three remaining pre-embryos.

Neither the text of the U.S. Constitution or any of the prior decisions of this Court address the competing rights and policy considerations involved in this dispute over ownership of three frozen pre-embryos

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[5] Robertson, J., "Prior Agreements for Disposition of Frozen Embryos," John A. Robertson. 51 Ohio St. L.J. 407 (1990).

that are each too small to be seen with the human eye.

For the last five years of litigation between Randy Roman and Augusta Roman, she has asked to use the frozen pre-embryos to try to buck the overwhelming odds (99% against) and try to create children, whereas Randy Roman has sought to avoid becoming a parent against his will by enforcing the contract the parties signed when they started the *in vitro* fertilization process. For the first time in a footnote in her petition to this Court, Augusta suggests that alternatively the frozen pre-embryos should be available for use by others who want children. Petition for Writ, page 7, footnote 2. Donation of the pre-embryos to strangers is not what the parties agreed to when they signed their contract with the fertility clinic, and it would still result in Randy Roman becoming a parent against his will. In fact, the potential psychological harm done to Randy Roman resulting from the birth of a biological offspring that he is not involved in raising, as he describes below, is something that the Court should not take lightly when considering the issues raised by Augusta Roman.

The Texas Court of Appeals agreed with Mr. Roman and enforced the contract signed by the parties with the fertility clinic, stating:

> *We believe that allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to*

> *mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties.*

Roman v. Roman, 193 S.W.3d 40, 55 (Tex. Civ. App. 2006).

The ruling of the Texas Court of Appeals is consistent with the rulings of all six state courts which have previously addressed this same issue, along with a recent decision of the European Court of Human Rights. These cases are cited and discussed below, but their decisions are largely glossed over by Augusta in her petition.

If this Court ultimately determines that Augusta has a constitutional right to procreate, the record shows that she had waived that right to use these three frozen pre-embryos created with Randy when she signed the paperwork at the IVF clinic. And, if Augusta's right to bear children survives her voluntary, written waiver in this case, her right must be balanced against Randy's right to not be forced by the government to have a child against his will – a right recognized by the other state courts that have already addressed this issue. In fact, whatever constitutional right Augusta may have should not matter because there is no state action involved to implicate the Bill of Rights. Augusta Roman has many other options to have children, besides these three frozen pre-embryos, which ultimately only have a one percent chance of success.

STATEMENT OF THE CASE

Randy Roman and Augusta Roman, before they began the *in vitro* fertilization process, signed a standard written agreement required by almost all fertility clinics that addressed the freezing of pre-embryos. A pre-embryo is the zygote created by fertilizing the woman's egg with the man's sperm and allowing it to grow to the size of about eight cells before it is implanted into the woman's uterus. Pre-embryos are commonly frozen (cryogenically preserved) in fertility clinics because typically more eggs are fertilized than will be implanted. Freezing pre-embryos allows the woman to avoid repeating the egg extraction procedure in the future in the event the implantation does not work the first time or in case the couple wants more children in the future.

The Romans signed the *Informed Consent for Cryopreservation of Embryos* agreement and then initialed this section on page 4:

> 10. *If we are divorced or either of us files for divorce* ***while any of our frozen embryos are still in the program****, we hereby authorize and direct, jointly and individually, that one of the following actions be taken: The frozen embryo(s) shall be . . .* ***Discarded***

The agreement also provides on page 2:

> *We consent and authorize the embryo(s) to be stored in a frozen state until Dr. Schnell and the IVF Laboratory determine that*

> *appropriate conditions exist for transfer of the embryo(s) to the wife's uterus and* ***both husband and wife agree to the transfer.*** . . . (emphasis added).

A disagreement between the parties on the night before the scheduled implantation resulted in three pre-embryos being frozen. The subsequent divorce between the Romans resulted in this current dispute over the frozen pre-embryos. The trial court awarded the pre-embryos to Augusta as property. The Texas Court of Appeals reversed and enforced the contract signed by the parties with the fertility clinic.

Augusta Roman concedes that the general odds of a woman at her current age (46) having a child using assisted reproduction are less than one percent.[6] However, Augusta grossly overstates the impact of discarding these three frozen pre-embryos on her ability to otherwise have children. At the trial four years ago, her physician, Vicki Schnell, M.D., testified that Augusta had a 20% to 25% chance of successfully having a child with the IVF process had it gone forward as originally planned; Augusta's chances of having a child dropped to less than ten percent after the embryos were frozen. Dr. Schnell described Augusta's options for having a child other than trying to use the frozen pre-embryos as follows:

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[6] Petition for Writ, page 5, footnote 1. Augusta's odds of successfully using the three frozen pre-embryos at issue are probably much less than one percent since Dr. Schnell testified at trial that freezing the pre-embryos cuts the odds in half.

1. Use her own eggs and donor sperm – her chances would be about ten percent of having a child, the same as using the frozen pre-embryos

2. Use donor eggs and donor sperm – her chances would be 60% to 70% of having a child

3. She could adopt.[7]

The record at trial does not establish that Augusta is unable to have children without the use of the frozen pre-embryos, despite her history of three elective abortions and two miscarriages. At the trial, Dr. Schnell testified as follows:

> *Q: Now, let's talk about today. Can Augusta Roman conceive a child, and by that, I mean, bear a child in her uterus through some way other than using the three frozen embryos that are before this Court?*
>
> *A: Yes.*
>
> *Q: And how could she do that?*
>
> *A: She could pursue trying to use her own ovaries and sperm from another source.*[8]

Randy Roman at trial explained why he would prefer that Augusta, if she insisted on having a child

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[7] Reporter's Record (R.R.) Vol. 2, page 39.

[8] R.R., Vol. 2, page 39.

via IVF, should use donor sperm and not the pre-embryos created using his sperm. Mr. Roman testified:

> *Our embryos were created with the intent to be used only during the marriage between Augusta and I. They were not created to be used in such a way that simply limits me to being a sperm donor, likewise they were not created to be used against my wishes.*[9]

Given that the Texas Family Code arguably states that Mr. Roman would not have any parental rights or duties as sperm donor, unless he specifically asked for them,[10] Mr. Roman still objected to the thought of Mrs. Roman bearing his children, saying:

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[9] R.R., Vol. 3, page 47.

[10] Texas Family Code Sec. 160.706 states:

160.706. Effect of Dissolution of Marriage

(a) If a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child.

(b) The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before the placement of eggs, sperm, or embryos.

Mr. Roman feels he morally must be a father in all senses of that word to any child created using his sperm. Accordingly, Mr. Roman filed his *Consent to Parentage of Embryos After Divorce* on February 20, 2004.

> *. . . if I am the biological father of a child, I could not bear the emotional consequences of being forced out of my child's life by a court order. And if my DNA does bring a child in this world, I would want to be a father in every sense of the word as financial, emotional, spiritual, soccer, little league, everything else in between.*[11]

Augusta Roman asserts to this Court that, "she neither seeks nor expects Randy to assume any parental or financial obligations for children born from these embryos." Petition for Writ, page 7. That argument is seemingly contradicted by Augusta's request to the trial court for actual damages for fraud and $1 million for exemplary damages, claims the trial court rejected. Moreover, Randy is demanding full parental responsibility and rights if any children are ever created using the frozen pre-embryos, so Augusta cannot argue that she should be awarded the pre-embryos because Randy will not be emotionally or financially burdened. If, against all odds, any children were ever created using these pre-embryos, they would be born into a bitter custody battle that is not likely to abate once there are live children to fight over.

The parties agreed to temporary orders pending appeal, which require that the pre-embryos remain frozen until all appeals are finally resolved.

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[11] R.R., Vol. 3, page 48.

REASONS FOR DENYING THE WRIT

This is a state law contractual dispute, not a case involving federal law or constitutional issues. In fact, this case is merely a contractual dispute between two parties, one of whom wants out of the contract she signed (and initialed) that clearly says any frozen pre-embryos shall be discarded in the event of divorce and one who does not want to be a parent against his will.

Augusta Roman's request for writ of certiorari is based purely on emotion and the overstatement of the facts. Furthermore, this case does not involve a pregnancy currently in place, but rather an attempt to become pregnant against overwhelming odds even if the frozen pre-embryos are released to Augusta. Contrary to her assertions to this Court, Augusta has other avenues for having children, including her own biological children, which have a much greater chance of success for pregnancy than trying to thaw then implant the pre-embryos that were frozen almost five years ago. The highest courts of six states and the European Court of Human Rights have addressed this issue, and all seven opinions support the positions advocated by Mr. Roman in this case. If there is a constitutional right at issue in this case, it is the right to decide whether *or not* to beget a child, a right Randy Roman has as well.

1. Certiorari should not be granted because this case does not meet the requirements of Supreme Court Rule 10.

Supreme Court Rule 10 states, "a petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 provides guidelines as to the types of cases this Court will review from a state court of last resort:

> *(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;*
>
> *(c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

This dispute simply does not involve any federal question, much less an important federal question. Instead, as stated above, it involves a contract dispute between the parties.

The decision of the Texas Court of Appeals does not address any federal question, nor does it conflict with the rulings of any other state court of last resort. Indeed, the ruling of the Texas Court is consistent with the holdings of the other appellate courts which have addressed this same issue (see discussion below).

2. Even if Augusta is not allowed to use the three frozen pre-embryos to try to conceive children with 99+% odds *against* success, she has other options for having children.

Augusta is wrong, based on the trial court record, to assert that "implantation of these embryos is her only opportunity to bear biologically related children." Petition for Writ, page 6. As noted above in the Statement of Facts, Dr. Schnell testified that Augusta, at the time of the trial, had the same chances of having *biological* children by using her own eggs with donor sperm as compared to using the frozen pre-embryos (ten percent chance in both cases). The trial court record is silent as to Augusta's odds of having a child using the frozen pre-embryos after they have been frozen for five years, except that Dr. Schnell did testify that the length of freezing the pre-embryos is not what reduces the odds. Schnell said the odds are reduced simply because the pre-embryos were frozen to begin with, plus the aging of the would-be mother's body.

Thus, it is not factually correct for Augusta to compare her situation to the criminals who faced sterilization in *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942).

3. All prior appellate decisions concerning custody of frozen pre-embryos agree with Randy Roman's position.

The highest courts of six states and the European Court of Human Rights have each addressed this issue, and all seven opinions support the positions advocated by Mr. Roman in this case:

- *Whitten v. Whitten,* 672 N.W.2d 768 (Iowa 2003). This opinion reviews prior cases and legal journal articles on disputes over frozen embryos and adopted the "contemporaneous mutual consent" approach – meaning nothing happens with the frozen embryos unless both parties agree.

- *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002), *cert. denied*, 537 U.S. 1191 (2003). The Supreme Court of Washington enforced the couple's agreement concerning the embryos, just as Mr. Roman wants done here.

- *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001). The New Jersey Supreme Court decided it would not force a person to be a parent against her will when the other spouse has other ways of having a child. That is the same position Mr. Roman is taking in this appeal.

- *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000). The highest court of Massachusetts balanced the parents' constitutional rights to procreate, and not to

procreate, and determined that the right to not procreate prevailed. Mr. Roman contends his right to not procreate against his will should triumph here as well since Mrs. Roman has other options for having a child that are more likely to succeed than her use of the three frozen pre-embryos.

- *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998). New York's highest appellate court ruled that the parties' written agreement concerning the embryos should be followed.

- *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1982). The Tennessee Supreme Court said that agreements between the parties should be followed. In the absence of a written agreement, the Court ruled that the constitutional right not to procreate should ordinarily prevail.

- *Evans v. The United Kingdom,* [GC], no. 6339/05, ECHR 2007-XV. The European Court of Human Rights affirmed the decision of a United Kingdom Court to not allow a woman whose ovaries had been removed because of cancer, to implant frozen embryos created prior to her cancer treatment, over the objection of her former boyfriend who had provided his sperm. This Court has previously looked to the European Court of Human Rights for guidance in privacy issues. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

4. If there is a constitutional right at issue in this case, it is the right to decide whether *or not* to beget a child, a right Randy Roman has as well.

Augusta argues that it is this Court's previous cases on access to contraceptives that describe Augusta's constitutional right to decide whether to bear a child without interference, citing *Griswold v. Connecticut*, 381 U.S. 479 (1963) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). However, she ignores the statement of Justice Brennan in *Carey v. Population Services International*, 431 U.S. 678, 685 (1977), which was made after a review of all of the privacy cases up to that point. Brennan wrote for the plurality, "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." Augusta's constitutional arguments conveniently omit the "or not beget a child" part of this right of privacy. This right of privacy involves the decision to have children and to not have children, and it is a right Randy Roman surely has as well.

Randy does not argue that his right to not have children provides him with a "veto" over Augusta's decision to become pregnant. He merely wants his constitutional right to not be made a parent against his will to be considered in the decision on whether or not to enforce the contract the parties signed as they started the IVF process. The narrow holding of the Texas Court of Appeals is limited to IVF involving a

signed agreement about what to do in the event of divorce. It is not realistic to argue, as Augusta does, that the Texas ruling could be a slippery slope that could ever be used to force pregnant women to have abortions or stop implantation into artificial wombs.

5. Augusta has waived any constitutional right to procreate using the three frozen pre-embryos because she signed a contract stating the embryos are to be discarded in the event of divorce.

To the extent Augusta has any constitutional right to procreate using the frozen pre-embryos, she has waived that right by signing the contract with the clinic that clearly says any frozen pre-embryos will be discarded in the event of divorce. A person may waive their constitutional rights in the civil context just as they can in criminal court. *Overmyer Co., Inc. v. Frick*, 405 U.S. 174, 185 (1972). One clear example is in the context of a person who certainly has a right to the freedom of expression; however, that person may waive that right contractually by signing a confidentiality agreement with their employer.

6. Ignoring the parties' contract with the fertility clinic would have devastating practical effect on the IVF industry.

Virtually all IVF clinics require their patients to sign written consent agreements similar to the contract signed by the Romans, which is put in place to

determine how any frozen pre-embryos will be treated in the event of a death, divorce, or even abandonment. If these agreements mean nothing and are rendered useless, each case of the thousands of couples that undergo IVF have the potential to be litigated to determine the relative options, desires and rights of the parties. This result will then place doctors and clinics in the position of being embroiled in litigation, just as happened here, while limiting their ability to practice medicine. In fact, Augusta Roman sued Dr. Schnell and her clinic, so that they would be bound by any court order. Dr. Schnell was forced to hire a lawyer and participate in this protracted litigation. If the clinic agreements governing frozen pre-embryos are found to be unenforceable, then clinics will likely simply stop freezing pre-embryos – resulting in women being forced to undergo additional egg extraction procedures in order to achieve pregnancy. In fact, the end result may be far fewer children being born as a result of IVF.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GREG B. ENOS*
THE ENOS LAW FIRM, P.C.
17207 Feather Craft Lane
Webster, Texas 77598
(281) 333-3030

THERESA M. ERICKSON
ERICKSON LAW, P.C.
14269 Danielson Street, Suite 101
Poway, California 92064
(858) 748-4133

Counsel for Respondent Randy M. Roman

**Counsel of Record*

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FILED
FEB 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 07-926

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

REPLY BRIEF TO BRIEF IN OPPOSITION TO GRANTING THE WRIT OF CERTIORARI

TERESA STANTON COLLETT
University of St. Thomas
School of Law*
MSL 400, 1000 La Salle Avenue
Minneapolis, MN 55403-2015
(651) 962-4973
tscollett@stthomas.edu

*affiliation shown for informational purposes only

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INTRODUCTION

The *Brief of Randy M. Roman in Opposition* raises seven objections to Augusta Roman's *Petition for Writ of Certiorari*: 1) there is no state action involved in this case (opp. at 6); 2) there are no important questions of federal law involved in this case (*id.* at 12 and 13); 3) the speculative nature of Augusta's attempt to successfully give birth to a child through the implantation of these embryos weighs against granting the writ of certiorari (*id.* at i, 5, 8 n.3, and 14); 4) Randy has a superior constitutional right to avoid psychological parentage resulting from the birth of a child due to the implantation of genetically-related embryos (*id.* at i, 9-11, and 17); 5) the unanimous results in all appellate cases considering disputes between intended parents over the implantation or destruction of embryos evidences the absence of any important question of law (*id.* at i, 6, 13, and 15-16); 6) Augusta has contractually waived any constitutional rights she may have to implantation of the embryos (*id.* at i, 6, and 18); and 7) a ruling by this Court in favor of Augusta on the merits would have devastating effect on the IVF industry (*id.* at i and18-19).

None of these objections are persuasive; many are unsupported by citation to legal authority; and at least two are in direct conflict with each other.

I. ORDERS DIRECTING THE DISPOSITION OF MARITAL PROPERTY AND DETERMINING PARENTAL RIGHTS CONSTITUTE STATE ACTION.

The legal issues in this case arise from a divorce proceeding,[1] in which the Texas courts were asked to determine the parties' rights to possession and implantation of genetically-related embryos. *Roman v. Roman*, 193 S.W.3d 40, 41-42 (Tex. Civ. App. 2006) (pet. app. at 1-2). After balancing the constitutional rights of the parties, the trial court awarded the embryos to Augusta as part of a just and right division of the community estate. *Roman v. Roman*, No. 2002-63153, Findings of Facts and Conclusions of Law (Dist. Ct., 310 Judicial Dist., Harris Cty., Tex.), pet. app. 39. The Court of Appeals for the First District of Texas declined to address

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[1] While it is true that this Court has historically been reluctant to become embroiled in domestic relations matters, it is clear that this reluctance is largely a matter of interpreting the statue conferring diversity jurisdiction upon federal courts, and not a matter of constitutional limitations on the Court's jurisdiction. *Marshall v. Marshall*, 547 U.S. 293, 298 (2006) and *Ankenbrandt v. Richards*, 504 U.S. 689, 697 (1992).

Petitioner seeks a determination of whether her constitutional rights to bear a child and to establish and continue the familial relationship includes the right to be free of government-ordered discarding of genetically-related embryos. As such, granting certiorari in this case is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, *see, e.g., Palmore v. Sidoti*, 466 U.S. 426, 432-34 (1984). *Cf. Marshall v. Marshall*, 547 U.S. 293, 305-13 (2006) (previous decisions only support narrow application of domestic relations and probate exceptions to jurisdiction of federal courts).

any constitutional issues, yet reversed and directed the trial court to issue an order that the frozen embryos be discarded in accordance with an agreement between the Romans and The Center for Reproductive Medicine ("the Center"). *Roman*, 193 S.W.3d at 55 (pet. app. 34-35).

If the Center is ordered to discard the embryos, Augusta will be permanently deprived of her ability to bear the biologically-related children whose birth may result from implantation of the embryos, and her right to establish or continue the familial relation with such children.

A. State Action in this Case is Similar to Involuntary Sterilization.

The issues in this case are most analogous to issues arising in cases involving government orders of sterilization or termination of parental rights in that judicially-order discarding of the embryos permanently deprives Augusta from having biologically related children and from continuing her biological relationship with the children who may be born as a result of allowing her to implant the embryos.

Respondent Randy Roman does not, and could not make any credible claim that orders of sterilization do not constitute state action. *Cf. Buck v. Bell*, 274 U.S. 200 (1927) and *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535 (1942). Instead he intermittently concedes and disputes that Augusta's chance of bearing a biologically-related

child, absent use of the embryos, is less than one percent at her present age. Opp. 8-9, 12 and 14. Augusta concedes that the record is silent on her *present* ability to conceive a biologically-related child, but the absence of such evidence is a necessary, if unfortunate, consequence of appellate review. If such evidence is critical to the application of the controlling constitutional norms in this case, it would be proper to remand the case for a determination of Augusta's present ability to conceive a biologically-related child *after* settling the constitutional norms that control the disposition of the embryos. The absence of such evidence at this time, however, should not bar this Court from granting her petition for certiorari. *Cf. Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2662 (2007) (describing the exception to the mootness doctrine for disputes capable of repetition, yet evading review).

B. State Action in this Case is Similar to the Termination of Parental Rights.

State action is also clearly present since Augusta's ability to establish and continue a familial relationship with the biologically-related children that may be born due to implantation of the embryos is finally and irrevocably terminated by the judicially-ordered discarding of the embryos. Judicial orders terminating familial relationships are indisputably state action. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 n.8 (1996) ("Although the termination proceeding in this case was initiated by private parties as a prelude to an adoption petition, rather

than by a state agency, the challenged state action remains essentially the same: M. L. B. resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships."). *See also Rivera v. Minnich*, 483 U.S. 574, 579-82 (1987) (contrasting gravity of state action involved in paternity and termination proceeding); and *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) ("[f]ew forms of state action are both so severe and so irreversible [as the termination of parental rights].").

Respondent, Randy Roman, has provided no legal argument supporting his assertion that "whatever constitutional right Augusta may have should not matter because there is no state action involved to implicate the Bill of Rights." Opp. at 6. This statement can only be accepted if the involvement of the state courts in this case is completely disregarded. Absent such disregard, the existence of state action is clear.

II. THE EXISTENCE OF FEDERAL CONSTITUTIONAL QUESTIONS IS ESTABLISHED BY THE RECORD AND RANDY'S CONTINUED RELIANCE ON COMPETING CONSTITUTIONAL CLAIMS.

Randy attempts to dissuade this Court from granting the writ of certiorari by arguing "[i]f there is a constitutional right at issue in this case, it is the right to decide whether or *not* to beget a child, a right Randy Roman has as well." Opp. at 12 (emphasis in original). This statement refutes his claim only two paragraphs later that "[t]his dispute

simply does not involve any federal question, much less an important federal question." Opp. at 13.

Both Augusta and Randy have argued that their constitutional rights are at stake throughout this litigation. This is evidenced by the trial court's statement that it arrived at its decision only after "balancing the constitutional rights of both parties," *Roman v. Roman*, No. 2002-63153, Findings of Facts and Conclusions of Law (Dist. Ct., 310 Judicial Dist., Harris Cty., Tex.), pet. app. 39, and the appellate court's description of Randy's constitutional claims. *Roman*, 193 S.W.3d at 42.

There is no legitimate question of whether important questions of federal law exist in this case.

A. This Case Presents the Important Question of Whether Constitutional Protections from Unwarranted Governmental Intrusion in the Decision to Bear or Beget a Child Apply in an Intervening Period between Conception and Pregnancy.

The Constitution protects the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision as to whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) this Court recognized that this right encompassed the right to continue a pregnancy free of unwarranted government interference. Both of

these decisions assumed a continuous process of sexual intercourse, conception and pregnancy. The advent of *in vitro* fertilization segments this process, eliminating sexual intercourse as the initiating event, and separating conception from pregnancy.

In the present case conception has occurred, but pregnancy has not begun. The narrow question presented by this case is whether the constitutional protections from unwarranted governmental intrusion in the decision to conceive a child and the decision to carry a pregnancy to term apply when there is an intervening period between conception and pregnancy.

The need for resolution of this issue was noted by the President's Council on Bioethics in their report, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF THE NEW BIOTECHNOLOGIES (2004).

> The most common litigation out of the context of assisted reproduction relates to the custody or disposition of untransferred embryos and rights and obligations of those standing in direct relationship to them. Courts are currently struggling with how to handle such cases, and they draw upon concepts from family law, constitutional law, and contracts or informed consent law to resolve the disputes.

Id. at 69.

B. This Case Presents the Important Question of Whether Constitutional Protections of Familial Relations Apply at Conception.

American jurisprudence leaves no doubt that the freedom to enter into, maintain, and cultivate familial relations is constitutionally protected. *E.g.*, *Troxell v. Granville*, 530 U.S. 57 (2000) (parents' authority over the upbringing of their children is "perhaps the oldest of the fundamental liberty interests recognized by this Court").

The law is equally clear that familial relationships arise at the moment of conception. Inheritance rights of children who are *en ventre sa mere* are commonly preserved until their birth. UNIFORM PROB. CODE § 2-108 (1990) and RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.1(d) (1999). In many states parents may recover for negligence resulting in the death of their unborn children. *See* Sheldon R. Shapiro, *Right to maintain action or to recover damages for death of unborn child*, 84 A.L.R.3d 411 (2007). Fathers may be required to contribute to the costs of pregnancy and childbirth, even in cases where the child is stillborn. *See e.g.*, *State ex rel. Discus v. Van Dorn*, 10 N.E.2d 14 (Ohio Dist. Ct. 1937); and *C. v. L.*, 305 N.Y.S.2d 69, 71, 61 Misc.2d 381, 382 (N.Y.Fam.Ct. 1969). *Cf. Boyd v. District of Columbia*, 526 F.Supp.2d 44, 49-50 (D.D.C. 2007) (putative fathers' rights to continue familial relations were violated by government

coercion which resulted in their partners obtaining abortions).

Randy's claim that this case involves no important federal question is not supported by argument in his response or the record of his past arguments of the case. Review by this Court is necessary to settle the important question of whether the constitutional protections of the decisions to beget a child and to establish or continue familial relationships extend to decisions of the genetic and intended parents seeking to implant their embryos.

III. The Medical Probability of Augusta Successfully Giving Birth to a Biologically-Related Child By Implantation of These Embryos is Irrelevant to the Decision to Grant Certiorari.

Randy opposes the granting of certiorari because of the small probability that Augusta will successful bear a biologically-related child through the implantation of these embryos, opp. 8 n.6, 12 and 14., yet he fails to explain how this is legally relevant to the question of whether this case presents important questions of federal law that should be settled by this Court. Augusta's claim is *not* that she has a constitutional right to successfully bear biologically-related children. Her claim is that she has a constitutional right to implant the genetically-related embryos in order to bear biologically-related children.

IV. Randy's Claim of a Superior Constitutional Right to Avoid Psychological Parentage Establishes the Need for this Court to Grant the Writ of Certiorari.

By asserting that the Constitution protects a right to avoid psychological parentage, opp. at 10-11 and 17-18, after voluntarily and intentionally participating in the conception of the embryos, Randy has conceded that this case requires constitutional interpretation by this Court. Augusta explicitly asked this Court to decide the merits of Randy's claims in Propositions II and III of her Petition for Writ of Certiorari.

V. Courts Have Divided Sharply Over the Enforceability of Contractual Waivers in Disputes Regarding the Disposition of Human Embryos.

Randy argues that Augusta's petition for certiorari should be declined because "[a]ll prior appellate decisions concerning custody of frozen pre-embryos agree" with his position. Opp. at 15-16. It is true that all appellate opinions addressing disputes between related parties over the disposition of embryos have denied implantation. This uniformity of outcome, however, masks importance analytical differences between the opinions.

The first American court to address competing claims over the disposition of embryos held that "[i]t serves the best interests of the child or children, in vitro, for their Mother, Mrs. Davis, to be permitted

the opportunity to bring them to term through implantation." *Davis v. Davis*, No. E-14496 (Tenn. Cir. Ct. Sept. 21, 1989) (Westlaw at 1989 WL 140495) at *1. The Tennessee Supreme Court ultimately reversed on the basis that the embryos were neither children nor property. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), cert. denied sub nom. *Stowe v. Davis*, 507 U.S. 911 (1993). The court recognized the constitutional dimensions of the right to procreate and the right to avoid procreation. *Id.* at 598-603. Since the constitutional rights asserted by the parties were in conflict, the court weighed the relative burdens that would be imposed by discarding the embryos, as advocated by the husband, and donating the embryos to unrelated parties for gestation, as desired by the wife. *Id.* at 604. The court held that the husband had the greater interest, but noted that the outcome might differ in a case, such as the one at bar, in which the party seeking to implant the embryos had no other reasonable possibility of "achieving [biological] parenthood by means other than use of the preembryos in question." *Id.* at 605.

In *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001), the court declined to rely upon an informed consent agreement between the couple and the IVF clinic, similar to the one in this case, instead embracing the constitutional reasoning of the *Davis* court and ordering the embryos be destroyed. *Id.* at 715-18.

In contrast, the New York Court of Appeals in *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) concluded that no constitutional rights were implicated. *Id.* at

564. Therefore the parties' agreement to donate embryos to an *in vitro* fertilization program for research purposes would control. *Id.* at 181-82.

The court's conclusion in *Litowitz v. Litowitz*, 48 P.3d 261, 262 (Wash. 2002), cert. denied 537 U.S. 1191 (2003) that no constitutional rights of wife were at stake is dependent upon the fact that the couple had used donor eggs in the creation of the embryos. The court ruled that because wife was not genetically related to embryos, "[a]ny right she may have to the preembryos must be based solely upon contract." *Id.* at 267. The outcome of this case has little relevance to Augusta's petition for certiorari since she contributed the eggs used in the conception of the embryos at issue.

The remaining appellate opinions relied upon in Randy's brief opposing certiorari do not rely upon the constitutional rights of the parties, instead deciding the cases based upon contractual analysis and interpretations of public policy. In *A.Z. v. B.Z.*, 725 N.E. 2d 1051 (Mass. 2000) the court declined to enforce the couple's agreement that the embryos would be given to the wife for implantation if the couple divorced, in part on the basis that enforcement would violate the public policy of the state. *Id.* at 1057-58. The Iowa Supreme Court adopted similar reasoning in *In re Marriage of Witten*, 672 N.W.2d 768, 789-93 (Iowa 2003).

The diversity of reasoning and constitutional analysis employed by these opinions evidence the

need for this Court to settle the important federal questions presented by this case.

VI. A RULING ON THE MERITS OF THIS CASE WOULD PROVIDE NEEDED GUIDANCE IVF PROVIDERS.

Randy's final objection to the issuance of a writ of certiorari is based upon speculation regarding the effect of a ruling in favor of Augusta on the merits of this case. It evaluating this objection, it is important to note the participation of Respondents, The Center for Reproductive Medicine and Vicki Schnell, M.D., in this litigation. These Respondents are the proper parties to raise any prudential concerns regarding the effect of a ruling in this case on IVF providers, yet they waived any objections to the petition. This waiver suggests that the Center and Dr. Schnell do not share Randy's concerns regarding the impact of a ruling on the merits. Such a ruling could provide much-needed certainly to IVF providers regarding the proper disposition of embryos in disputes between parties who are related to the embryos. *See* President's Council on Bioethics, REPRODUCTION AND RESPONSIBILITY (2004) at 9 and 69.

CONCLUSION

Respondent Randy Roman has failed to establish any argument against the granting of certiorari in this case. Notwithstanding its caption, the *Brief for Randy M. Roman in Opposition* contains significant support for Petitioner's assertion

that this case presents important questions of federal law that should be settled by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

TERESA STANTON COLLETT
University of St. Thomas
School of Law*
MSL 400, 1000 La Salle Avenue
Minneapolis, MN 55403-2015
(651) 962-4973
tscollett@stthomas.edu

FEBRUARY 2008

*affiliation shown for informational purposes only

FILED
APR 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

4

No. 07-926

In the Supreme Court of the United States

AUGUSTA N. ROMAN, PETITIONER,

VS.

RANDY M. ROMAN, *ET AL.*, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

PETITION FOR REHEARING

TERESA STANTON COLLETT
University of St. Thomas
School of Law*
MSL 400, 1000 La Salle Avenue
Minneapolis, MN 55403-2015
(651) 962-4973
tscollett@stthomas.edu

*affiliation shown for informational purposes only

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on March 17, 2008, and (2) grant the petition. As grounds for this motion, petitioner states the following:

Review by this Court is necessary to clarify whether and how constitutional norms apply to the relationship between genetic and intended parents and the *ex corporeal* human embryos created through an *in vitro* fertilization process ("IVF"). This is an important question that impacts infertile men and women, physicians and scientists involved in reproductive medicine, and government officials responsible for protecting the public's health and safety.

Twelve percent of American women of childbearing age have used an infertility service. Centers for Disease Control and Prevention *et al.*, 2005 *Assisted Reproduction Technology Success Rates: National Summary and Fertility Clinic Reports* 1 (2007). Seven percent of all married couples that include a woman of reproductive age are unable to conceive a child within one year of uncontracepted sex. *Id.* at 3. While millions of these couples have used IVF over the past quarter century, the process is expensive, time-consuming and fraught with difficulties. *See id* at 1. When deciding to undergo this process, it is critically important that

these couples know their rights and obligations, including those arising under the Constitution. The present case presents an ideal opportunity for this Court to provide some certainty as to the constitutional rights and obligations of those couples.

Whether progenitors of *ex corporeal* embryos have constitutional rights related to the embryos created is also important to physicians and scientists involved in reproductive medicine. The medical profession is largely self-regulating, as are many scientific groups. As such, professional rules define these professionals obligations regarding consent of patients or subjects of inquiry, standards of care or protocols during treatment or experimentation, and obligations of follow-up or continued monitoring of results. These rules and attendant procedures will differ if constitutional limitations or rights exist between sperm and egg donors and the embryos they create. For example, members of a committee established by the National Academy of Sciences recently confronted the question of whether the informed consent of anonymous sperm donors was required in cases where excess embryos were to be used for research. In attempting to balance the gamete donors' expectations with the desires of the research community for access to additional embryos, the committee looked to the number of cases that would be impacted by a rule change. National Research Council and Institute of

Medicine, *2007 Amendments to the National Academies' Guidelines for Human Embryonic Stem Cell Research* 12 (2007). Ultimately the committee recommended continuing to require consent. This result would likely have been the same if the committee knew that gamete providers have constitutional rights, but the committee's rationale, and thus the outcome of future decisions, might have differed.

The constitutional status of the relationship between genetic parents and *ex corporeal* embryos is also of great concern to legislators and other state officials. Sixteen states currently have some statutes addressing the creation, implantation, and disposition of human embryos. National Conference of State Legislatures, *State Laws on Frozen Embryos: Gamete (Egg/Sperm) and Embryo Disposition*, at http://www.ncsl.org/programs/health/embryodisposition.htm (last visited April 10, 2008). This legislative session Arizona, Indiana, New Jersey, and West Virginia are considering similar legislation. S.B. 1208, 48th Leg., 2nd Reg. Sess.(Ariz. 2008); H.B. 1075, 2008 Reg. Sess. (Ind. 2008); S.B. 147, 2008 Reg. Sess. (Ind. 2008); A.B. 1281, 213th Leg. (N.J. 2008); and H.B. 4463, 78th Leg., 2nd Sess. (W.Va. 2008). All of these laws are subject to the constitutional constraints of due process, equal protection and privacy, yet there is no guidance from this Court on the application of those constraints to assisted reproductive technologies. Thus, when

disputes arise regarding these statues, government officials and lower courts are left to infer the proper constitutional standards from the text of the Constitution and the cases of this Court interpreting that text in clearly distinguishable fact patterns. See President's Council on Bioethics, REPRODUCTION AND RESPONSIBILITY: REGULATION OF THE NEW BIOTECHNOLOGIES 69 (2004) (noting that the most common cases involving assisted reproductive technologies ("ART") arise from conflicts over "the custody or disposition of untransferred embryos and rights and obligations of those standing in direct relationship to them."). It is important to the development of law in this area that this Court defines the basic application of constitutional norms to ART.

For almost twenty years lower courts have been struggling with the question of whether and how constitutional constraints apply to ART. Since the early Tennessee trial court decision in *Davis v. Davis*, No. E-14496 (Tenn. Cir. Ct. Sept. 21, 1989) (Westlaw at 1989 WL 140495), judges have been confronted with questions regarding the proper legal framework for deciding who controls the disposition of *ex corporeal* embryos. These cases have arisen, not only in disputes between wives and husbands, but also between fertility clinics and genetic parents, intended and gestational parents, and institutions sponsoring fertility clinics and renegade

professionals. *See York v. Jones*, 717 F. Supp. 421 (S.D. Va. 1989) (dispute between genetic parents and fertility clinic); *Prato-Morrison v. Doe*, 126 Cal. Rptr.2d 509 (App. 2 Dist., 2002) (plaintiffs unable to establish that they were the intended parents of the child born through the use of IVF); and Stone *v. Regents of University of California*, 92 Cal. Rptr.2d 94 (App. 4 Dist., 1999) (member of medical faculty was not entitled to university-funded defense to claims of "embryo-stealing"). The lower courts have differed dramatically in their conclusions regarding whether constitutional protections apply. *Compare Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), cert. denied sub nom. *Stowe v. Davis*, 507 U.S. 911 (1993) (constitutional concerns are determinative) and *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (no constitutional rights were implicated). This has led to the development of a confused body of law that fails to provide the stability and certainty that is required when dealing with questions of human reproduction. Only a ruling by this Court can bring order to this chaotic jurisprudence.

The present case, involving only claims by the genetic parents, is the ideal vehicle for pronouncing the application of constitutional norms in this area. Unlike more complex questions that arise in cases involving different genetic, intended, and gestational parents, the questions present in *Roman v. Roman*, while legally complex, are factually straightforward:

1. Whether the fundamental right to procreate is violated by a judicial order denying implantation of embryos by a genetic parent who is unable to conceive or bear a biological child by other means;

2. Whether the constitutional liberty interest in decisions whether to bear or beget a child encompasses a right to deny implantation of embryos in a genetic parent who desires the implantation; and

3. Whether the fundamental right to enter into familial relationships is violated by a judicial order denying implantation of embryos by a genetic parent who is unable to conceive or bear a biological child by other means.

This Court should provide much needed guidance to the lower courts regarding the application of constitutional protections and limitations to assisted reproductive technology by granting this petition for rehearing and vacating the denial of the petition for certiorari in this case.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

TERESA STANTON COLLETT
University of St. Thomas
School of Law*
MSL 400, 1000 La Salle Avenue
Minneapolis, MN 55403-2015
(651) 962-4973
tscollett@stthomas.edu

APRIL 2008

*affiliation shown for informational purposes only

CERTIFICATE OF COUNSEL

I, Teresa S. Collett, counsel of record in the above-captioned case, certify that this petition for rehearing is limited to the grounds specified in Supreme Court Rule 44.2, and is presented in good faith and not for purposes of delay.

_____

Teresa S. Collett